

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,) Criminal
) No. 15-252 (PKC)
Government,)
) MOTION HEARING
vs.)
) Brooklyn, New York
JEFFREY WEBB, et al.,) Date: April 6, 2017
) Time: 10:00 a.m.
Defendants.)

TRANSCRIPT OF MOTION HEARING
HELD BEFORE
THE HONORABLE JUDGE PAMELA K. CHEN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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(Appearances continued on next page)

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by computer-aided transcription.

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1 (WHEREUPON, commencing at 10:12 a.m., the following
2 proceedings were had in open court, to wit:)

3 THE COURTROOM DEPUTY: Criminal cause for motion
4 hearing, Docket 15-CR-252, *United States v. Webb, et al.*

5 Will the parties please state their appearances for
6 the record.

7 MR. NITZE: Sam Nitze, Kristin Mace, and Keith
8 Edelman for the United States. Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. PAPPALARDO: John Pappalardo and Silvia
11 Piñera-Vazquez for Mr. Napout.

12 THE COURT: Good morning. Nice to see you again.

13 MR. STILLMAN: Good morning. Charles Stillman, Jim
14 Mitchell, and Julio Barbosa for Mr. Marin.

15 THE COURT: Good morning. Good to see you again.

16 MR. UDOLF: Good morning, Your Honor. Bruce Udolf
17 on behalf of Mr. Manuel Burga.

18 MR. MIEDEL: Good morning, Your Honor. Florian
19 Miedel on behalf of Hector Trujillo. My cocounsel Joshua
20 Paulson will be here in just a couple minutes.

21 THE COURT: Good morning.

22 MR. MEHLER: Good morning. Gordon Mehler on behalf
23 of Costas Takkas, who is here.

24 THE COURT: Good morning to you, and to you,
25 Mr. Takkas.

1 All right. So as everyone knows, we are here for
2 oral argument on a couple of different motions, primarily five
3 of the defendants, all five defendants' severance motions, and
4 then also Mr. Napout's speedy trial motion.

5 Before we start, I have been asked by the court
6 reporter to remind all defense counsel to reidentify yourself
7 every time you stand up because there's so many of you, it
8 will be impossible for her to keep track of who's speaking in
9 that moment.

10 Now, let me just set the stage a little bit, having
11 obviously read all of the papers. Four of the five defendants
12 are seeking to sever his trial from the other defendants, and
13 then Defendant Takkas is also seeking to sever not only his
14 trial from the other defendants, but also his trial on the
15 RICO conspiracy charge from the money laundering and wire --
16 the wire and money laundering conspiracy charges against him.

17 And as I said before, Defendant Napout is also
18 seeking a speedy trial or speedy trial relief, I presume
19 namely to have his trial as soon as possible.

20 Now, I am going to give all the parties an
21 opportunity to speak and to make all the arguments you want,
22 but I want you to understand that as I see it, all of these
23 severance motions coalesce around the same principles, the
24 same legal principles and much of the same case law. And
25 they're really identical in kind, though different in

1 specifics. To me, they are variations on a theme, to put it
2 simply. So I want you to avoid rehashing arguments made by
3 your cocounsel, especially about core legal principles, such
4 as prejudicial spillover, antagonistic defenses, or anything
5 in that nature. Rest assured, I am aware of the case law,
6 you've cited it in your briefs, and you should focus your
7 arguments on the specifics relating to your particular client.

8 I know that many of you have made the argument that
9 the evidence that will be produced as to your particular
10 client is dwarfed by the evidence that will be produced in
11 relation to other defendants. So try to be as specific as
12 possible.

13 Now, I see, and I want to tee this up for everybody,
14 the largely determinative issue to be, with respect to the
15 severance motions, and I have to be honest, I don't think it
16 was sufficiently addressed, at least to my mind, by the
17 defendants, even in their reply papers. It's the argument,
18 obviously, that the government makes, which is that every
19 defendant is charged in this RICO conspiracy. And it is
20 pretty much black letter law that the government is entitled
21 to put in evidence to prove that conspiracy, which could
22 entail evidence that doesn't relate directly to conduct
23 committed by an individual defendant.

24 So in that regard, I want to read for you a section
25 from *US v. DiNome*, D-i-N-o-m-e, Second Circuit case, I know

1 that you are all familiar with, from 1992, 954 F.2d 839. And,
2 specifically, I am reading a very short passage from page 843
3 in the reported decision.

4 And there the Second Circuit noted, and I think
5 this, for me, is the central issue that the defense has to
6 deal with, and it is certainly at the heart of the
7 government's opposition to severance. The Second Circuit
8 says: We note here that the government must prove an
9 enterprise and a pattern of racketeering activity as elements
10 of a RICO violation. It then, of course, cites 18 USC
11 1962(c).

12 Come on in. Is this your cocounsel, Mr. Miedel?

13 MR. MIEDEL: Yes.

14 THE COURT: Okay. Let's pause for a moment. Please
15 state your name for the record.

16 MR. PAULSON: Joshua Paulson.

17 THE COURT: Good morning, Mr. Paulson. Have a seat.

18 MR. PAULSON: My apologies for being late.

19 THE COURT: As I have advised all the other counsel,
20 if you stand up to speak, just identify yourself for the court
21 reporter so she can keep track of everyone.

22 So then *DiNome* goes on to say: Proof of these
23 elements, namely the RICO violation, may well entail evidence
24 of each -- I'm sorry, may well entail evidence of numerous
25 criminal acts by a variety of persons, and each defendant in a

1 RICO case may reasonably claim no direct participation in some
2 of those acts. Nevertheless, evidence of those acts is
3 relevant to the RICO charges against each defendant, and the
4 claim that separate trials would eliminate the so-called
5 spillover prejudice is at least overstated, if not entirely
6 meritless.

7 That is your task on the defense side, is to
8 distinguish that general proposition, because that is a
9 situation that all of you face here. All five defendants, as
10 you know, are charged in one overarching RICO conspiracy.
11 And, thus, the government, although I don't necessarily agree
12 with how far that principle can always go, but the government
13 certainly is entitled, if not required, to introduce evidence
14 to establish both the enterprise and the pattern of
15 racketeering activity.

16 I agree with the defense that the scope of how much
17 information can come in in that regard has to be reasonably
18 limited, so as to not to create prejudice to the defendants.
19 But how do you justify separating yourselves from the other
20 four defendants, if there is such a RICO conspiracy, and if at
21 every trial on this RICO conspiracy charge the government is
22 allowed to introduce evidence of a pattern of racketeering,
23 which could well entail evidence about crimes in which your
24 client was not involved?

25 So I would like you to focus on that, and explain to

1 me how you can overcome that general principle. And,
2 obviously, everything else you want to argue.

3 Now, unless the defense counsel has agreed upon an
4 order of argument, here's the one that I would like to follow.
5 I would like to start with the attorneys for Mr. Trujillo,
6 followed by the attorneys for Mr. Marin, next Defendant Burga,
7 in part because he joined in Defendant Marin's motion, as well
8 as added some supplemental argument, to be followed by the
9 attorney for Mr. Takkas, who, as I mentioned, is the only one
10 who's seeking to sever not only as to the other defendants,
11 but also as to his individual counts from the RICO count. And
12 then last, but not least, the attorneys for Mr. Napout,
13 because they are arguing not only severance, but also speedy
14 trial.

15 So unless that upsets an agreement that you all
16 have, that's how I would like to proceed, and I think that
17 will help me keep my briefs separate as well.

18 All right. So with that, Mr. Miedel or Mr. Paulson?

19 MR. PAULSON: Yes, Your Honor. Thank you. Joshua
20 Paulson for Mr. Hector Trujillo.

21 Judge, without, of course, rehashing everything
22 that's been in the briefs, I do want to simply point out that
23 we've been watching the RICO statute for years being pushed
24 further and further from the original purpose it had of
25 prosecuting organized crime within the United States. And

1 we've never seen something quite like this, I don't think.

2 The point that I think we've all raised in the
3 briefs isn't to try to seek dismissal of RICO at this stage,
4 because this is a fact based problem that I think will be
5 determined at trial, and I think we can probably reasonably
6 anticipate a number of Rule 29s on this issue at trial.
7 However, we believe that particularly with respect to
8 Mr. Trujillo, the government is using the RICO charge to
9 simply get around Rule 403. We submitted a couple of cases to
10 that point in our brief, particularly the reply. But the
11 question really isn't whether or not the government is
12 technically allowed to introduce evidence of the larger RICO
13 conspiracy against Mr. Trujillo, it is how much of that would
14 they be allowed to introduce if the trials were severed or,
15 for example, as a hypothetical thought experiment, if
16 Mr. Trujillo were the last defendant standing, what RICO
17 evidence of CONMEBOL would the government be introducing at
18 his trial. We submit that it would be very little, if any, at
19 all.

20 They're arguing a very substantial international
21 conspiracy over many years. To connect it to Mr. Trujillo,
22 they really only need to introduce the fact that there was a
23 conspiracy of which he was a part. They have not alleged any
24 association whatsoever between Mr. Trujillo and the CONMEBOL
25 conspiracy, the CONMEBOL defendants, and that's going to be

1 the bulk of this joint trial.

2 We may have weeks or months of listening to hundreds
3 of hours of recordings, millions of pages of documents, that
4 simply have nothing to do with Mr. Trujillo. The evidence
5 against him is very limited. It is concise, there are, I
6 believe, four or five documents, total, that the government
7 submitted with respect to its bill of particulars that are
8 tainted documentally to Mr. Trujillo. The conspiracies of
9 which he is alleged to be a part are simply very, very limited
10 and completely unrelated to those of the remaining defendants.

11 THE COURT: Well, let me ask you a question, in the
12 vein of a thought experiment. Let's imagine Mr. Trujillo's
13 just going to trial by himself, as you posit. What evidence
14 of the RICO conspiracy would you think is both sufficient and
15 not overly prejudicial or overly broad?

16 MR. PAULSON: If the government wished to introduce
17 limited evidence that the conspiracy extended throughout South
18 America, they could certainly do that. They could do that
19 without introducing millions of pages of documents. They
20 could probably do it with one or two witnesses over the course
21 of a couple of hours. Likewise --

22 THE COURT: Some summary witnesses? Some kind of
23 summary witness?

24 MR. PAULSON: Yes, Your Honor. And they could
25 certainly introduce the facts from their cooperators from

1 Traffic, Media World, whichever these other organizations are
2 that were involved in some kind of larger aspect of the
3 conspiracies, but it wouldn't take us months, Your Honor, it
4 would take us a day or two.

5 The evidence that they have related to the CONCACAF
6 conspiracies, the World Cup qualifying matches, which would be
7 much more relevant to their case against Mr. Trujillo, would
8 certainly be allowable, and that still goes beyond
9 Mr. Trujillo's direct participation because he had nothing to
10 do with CONCACAF. However, it puts his facts within that
11 larger scope of the supposed RICO conspiracy. But, again, we
12 are talking about a very limited number of hours of RICO
13 evidence outside of the specific conspiracy that he's alleged
14 to be a part of.

15 THE COURT: Okay. Continue. I didn't mean to
16 interrupt you.

17 MR. PAULSON: Those are the primary points,
18 Your Honor, unless Your Honor has additional questions. But
19 we simply feel that the scope of Mr. Trujillo's alleged
20 participation is really such that his trial is going to be
21 completely consumed by evidence, which if he were tried
22 separately, would not be admissible under Rule 403 because it
23 would be cumulative, it would be prejudicial, and the simple
24 fact that he's charged as part of the same RICO conspiracy
25 would not allow him in a separate trial to sit through

1 hundreds of hours of evidence against the CONMEBOL defendants.
2 That can be established much more concisely, much more
3 briefly, and saving judicial economy.

4 THE COURT: All right. Thank you very much.

5 Next we have the attorneys for Mr. Stillman. Yes?

6 MR. STILLMAN: Yes, Your Honor. Good morning.

7 THE COURT: Good morning.

8 MR. STILLMAN: I guess if I could put on
9 Mr. Paulson's glasses and change my hair, I could get up and
10 say kind of the same things that he was just saying to you,
11 Your Honor.

12 THE COURT: No facelift needed, or whatever it is
13 you are envisioning.

14 (Laughter.)

15 MR. STILLMAN: I'll have to defend the ground that I
16 am stuck with.

17 But, Your Honor, in your opinion denying our motion
18 to dismiss, you said the global conspiracy alleged in Count 1,
19 I think I got it right in my notes here, has a different scope
20 and different objectives than the conspiracies alleged in the
21 other counts of the indictment, and you went on to say,
22 therefore, it is not duplicitous. It was a duplicity
23 argument.

24 But what I am concentrating this morning on,
25 Your Honor, is the notion of just that very point, that the

1 global conspiracy, the global RICO, I will call it the global
2 RICO conspiracy, has a different scope. We know that, it is
3 decades of proof, it's taken 236 pages to spell it all out.
4 And then when you talk -- when you speak of the different
5 objectives in the smaller conspiracy, well, here we know that
6 if you go through this indictment and through this RICO,
7 there's 99 crimes, 38 conspiracies, I don't know what the
8 number of defendants are, because of the original indictment
9 and the second indictment, the unnamed coconspirators, there's
10 an army of people whom they say are part of this RICO
11 conspiracy.

12 And the case law, and Your Honor obviously points
13 out an important case, Second Circuit case, and the Eastern
14 District has been the fount of a lot of cases in this area,
15 from *Upton* to *Gallo*, I am sure Your Honor knows them all. And
16 yet when you look at the cases cited -- I have it right here.
17 Just give me one split second, Judge. *Upton*.

18 So in *Upton*, you know, your colleague Judge
19 Glasser -- it was not RICO, okay, it was conspiracy, but,
20 nevertheless, he was confronted with this same kind of
21 situation. And what Judge Glasser saw was that with respect
22 to at least two of the defendants, they just didn't belong.
23 It wasn't right to put them into the bigger case, and he
24 severed them. You know, the judge granted the motion to
25 sever, and others tried to get out, and he said, "No, you

1 can't get out." And I think that this really is a kind of a
2 carry-on, if you will, from what my colleague Mr. Paulson was
3 talking about.

4 Your Honor asked him what would happen if this case
5 was United States v. Jose Maria Marin, everybody else had
6 disappeared, and I am not saying anything other than they are
7 not there. And I know I can say the same thing, they may get
8 up and argue with me about it --

9 THE COURT: Under my rules they can't do that.

10 MR. STILLMAN: That's good.

11 To a moral certainty, the trial of United States v.
12 Jose Maria Marin on this very same indictment would be a much
13 shorter, smaller, tighter, their view of RICO would be a
14 narrower view of what this RICO thing was, that if we go to
15 this joint trial and Marin is not separated, he's going to be
16 confronted with sitting day after day of evidence having
17 nothing to do with him. Granted, it has to do with the RICO
18 conspiracy, I get that. But the spillover, may not be the
19 word that the Circuit likes, but there will be spillover.
20 There will be harm to him, and we can eliminate that harm by a
21 separate trial.

22 THE COURT: Well, let me ask you a question, since
23 you are the first of the three CONMEBOL defendants who are
24 remaining. I don't understand how you can argue that you
25 should be severed from the other two CONMEBOL defendants, at a

1 minimum, because you are all charged -- they are all charged
2 with the same smaller subconspiracy, if you will, relating to
3 the Copa America Centenario, and also the Copa Libertadores
4 scheme, too.

5 So as to the other two defendants, Mr. Napout and
6 Mr. Burga, do you really have any kind of a severance
7 argument?

8 MR. STILLMAN: No.

9 THE COURT: Okay. Now you are just arguing as to
10 Mr. Trujillo and also then Mr. -- oh, no, I guess that would
11 be it, just to Mr. Trujillo, really.

12 Okay. I appreciate that. So, basically, your
13 argument is similar, which is that all the RICO related
14 evidence would really swamp the case as to your client and
15 confuse the jury.

16 MR. STILLMAN: Look. Your Honor -- just one second.
17 (Short pause while counsel confer.)

18 MR. STILLMAN: What my partner Jim Mitchell points
19 out to me, Your Honor, is that maybe I was too hasty.

20 THE COURT: I figured there would be some dissent
21 amongst those at this table.

22 MR. STILLMAN: That's why I bring my lawyer along,
23 you know, to make sure I get this right.

24 What Jim Mitchell points out to me, Your Honor, and
25 I should have pointed out to you, is that, yes, it is true

1 that, you know, that they have the commonalty of CONMEBOL.
2 But the evidence as to participation is not going to be the
3 same. It is just not. And I think that that's where I really
4 made my mistake in answering too quickly, Your Honor.

5 And so if you say what is the proof going to be,
6 well, you know, it is going to be the proof that they have, or
7 that they have and they are going to try to offer. But our --

8 THE COURT: Well, some of which you have obviously
9 seen through discovery, no?

10 MR. STILLMAN: Your Honor, to say you have seen
11 things in discovery in this case is to be a pretty hard
12 thing -- there are mountains and mountains of material. And I
13 would say, up to this point, that very little that I have seen
14 would indicate to me that there's going to be that commonalty
15 merely because they are in the CONMEBOL -- they are CONMEBOL
16 related. So I don't think CONMEBOL is going to be the tie
17 here, Your Honor.

18 THE COURT: But you would agree, and, obviously, you
19 have done so many cases you certainly have been in the
20 situation where the evidence against one defendant may be much
21 greater either in volume or quality than against another
22 defendant, but that isn't necessarily enough to justify
23 severance.

24 MR. STILLMAN: No, it isn't, all the time, and yet
25 there are times, as I say, you know, as Judge Glasser found in

1 Upton, as he looked ahead to that case, he could see that the
2 evidence with respect to these two defendants, I think they
3 came from Atlanta, there was an Atlanta piece to that case,
4 with respect to that, Judge Glasser said, "No, I don't think
5 they belong here, and I am going to let them out." And he
6 goes on to say maybe that there will be a plea some day by
7 them.

8 But, nevertheless, so I think the fact that there is
9 going to be more evidence with respect to one than the other
10 is not really the point here. The point is, look. What are
11 we struggling for? We are struggling for what -- a fair
12 trial, right? And what we know to a certainty is you and
13 Your Honor doing your job, you are going to do everything in
14 your power to see to it that's a fair trial. And I totally
15 get that and respect it.

16 But my concern is that having Marin, Jose Maria
17 Marin, sitting in the courtroom where mountains of evidence
18 are coming in that really have nothing to do with him, he
19 really faces the specter of just, you know, just being
20 convicted on something that he didn't do, in spite of your
21 best efforts by instructions and all of the other things, and
22 our efforts as lawyers to advocate on his behalf. And there
23 is a way to avoid that. Now, it does put more burden on the
24 system. I totally get that, but, you know, that's what we all
25 get paid to do, you know.

1 THE COURT: Well, I will leave it to the government
2 to respond to the evidentiary issue you raise because,
3 obviously, you're making it to some extent, by your own
4 admission, in the abstract. Because you don't know exactly
5 what the quantum of evidence is going to be as to your client,
6 versus Mr. Napout or Mr. Burga, who are similarly claiming
7 that the mountain of evidence will be about some other
8 defendants.

9 So, clearly, there is some truth that applies to
10 these statements or not, and I think the government is in a
11 better position to respond to that. But you have to
12 acknowledge that your argument about the evidence really is
13 based on a less than complete view of what that evidence will
14 be.

15 MR. STILLMAN: Well, that's true, Your Honor, except
16 that when I look at the indictment and I see, you know,
17 hundreds of paragraphs and I am only in a half a dozen
18 paragraphs, and I see scores and scores of criminal
19 conspiracies charged, and I am only in a couple of the
20 conspiracies charged, that is a fairly decent signal to me
21 that the weight of the overall evidence is going to be far
22 different with respect to the charge here. I mean, the weird
23 thing, quite frankly, Your Honor, the strange thing about this
24 situation right now is that you have the five of us here going
25 to trial and an indictment that's got, you know, all this

1 stuff in there, and the people who are all -- they're either
2 going to be witnesses, God knows what we'll find out about
3 them, and so it is kind of a strange moment in this case where
4 the government wants to put in the evidence of 236 paragraphs
5 to these five gents over here. And what we're trying to do is
6 figure out a way to see to it that we all, each of us,
7 representing our respective clients, get a fair trial out of
8 this, which is, obviously, I know your goal as much as it is
9 ours.

10 THE COURT: Okay. Well, certainly I am going to ask
11 the government about how much of the 236-paragraph indictment
12 they intend to put on trial. I think that's a large part of
13 the equation that we're all grappling with here.

14 So thank you very much, Mr. Stillman.

15 Let's go next to the attorneys for Mr. Burga.

16 MR. UDOLF: Good morning, Your Honor. Bruce Udolf
17 on behalf of Mr. Burga.

18 I don't have much to add to what Mr. Stillman just
19 said. I would point out to the Court that similarly to his
20 client, my client is only mentioned in a few paragraphs of the
21 RICO count as well. And there's an additional fact in my case
22 because my client has not been extradited on the four other
23 charges that are against him, which are two wire fraud charges
24 and two money laundering charges.

25 THE COURT: But the obvious response, and the one

1 the government gives, is that even so, the evidence about the
2 acts he committed has to be put in as part of the RICO charge
3 against him to show how it is that he actually participated in
4 the activities of the alleged RICO conspiracy.

5 So you don't really get any benefit,
6 evidentiary-wise, from the fact that he was only extradited on
7 the RICO conspiracy, which is obviously the much bigger
8 charge.

9 MR. UDOLF: Well, Judge, my research isn't, in all
10 honesty, is not complete on that issue so I am not willing to
11 concede that point.

12 THE COURT: Well, quite frankly, even if you weren't
13 in the case at all, the government might seek to put on that
14 evidence just to show the pattern of racketeering engaged in
15 by the conspiracy that's alleged, even if your client wasn't
16 here and wasn't a defendant.

17 It is hard for me to imagine that now he is a
18 defendant, how that would come out. That seems even quite the
19 opposite of what should happen. But you can continue to do
20 your research. Maybe you'll convince me otherwise. I just
21 don't see much merit in that argument.

22 MR. UDOLF: The fact is, though, as Your Honor
23 correctly observed, without undermining Mr. Stillman's
24 argument on this point, I mean, there is a different situation
25 in terms of the CONMEBOL defendants than there are against the

1 other defendants in this case.

2 And, you know, part of it is, has to do with the
3 amount of prejudice against my client. It is clearly a
4 different level of prejudice in admission of acts that were
5 committed and committed by other defendants in connection with
6 the CONMEBOL transactions, than in all the other transactions
7 that are specified, that are set forth with a lot more
8 specificity in the indictment than anything my client did. As
9 a matter of fact, I can't imagine the allegations against my
10 client being more vague, including some reference to him
11 having agreed to receive in excess of seven figures. I've
12 seen maybe a total of maybe no more than a dozen documents in
13 this case that have anything to do with my client, out of 12
14 million so far. Now, admittedly, I have not gone through all
15 the evidence in this case, and there may be others. But it is
16 really a scant proportion of the evidence.

17 But, you know, the thing is, the government elected
18 to bring this RICO charge, and now they are saying, "Well, we
19 can put all this other junk into evidence because we -- the
20 grand jury has returned an indictment on the RICO charge."
21 But they could just as well have kept it simple and charged
22 Mr. Marin, Mr. Burga, for instance, with the CONMEBOL offenses
23 or CONMEBOL offense. They elected to do this, and now they
24 are sort of using that as an excuse to let in the kitchen sink
25 and say "We can go into anything."

1 But at some particular point, that rises to a level
2 of such prejudice. And I frankly don't presume to know what
3 evidence there is out there about Mr. Webb, for instance, or
4 all these other individuals, but I presume since he's the
5 first name on the indictment, it is not going to be good, and
6 there's going to be a lot of evidence out there that will not
7 inure to my client's benefit. And so I'm concerned about
8 that.

9 It may very well be that they may choose to limit
10 the evidence that they make and present in their case in chief
11 as to certain transactions. They are not required to go to
12 trial on that. But if they do throw in the kitchen sink, that
13 will severely prejudice my client.

14 When I was a prosecutor, I indicted dozens of RICO
15 cases. I'm very familiar with the statute and the history of
16 the statute. And as counsel previously noted, it was
17 originally part of an anti-organized crime package. I think
18 it was 1970 when it came into being, and it was largely the
19 result of a protege of Robert Kennedy named Robert Blakey who
20 came up with this scheme. And the whole purpose of it was to
21 allow disparate acts and disparate actors to be taken down in
22 one RICO umbrella.

23 But the reason for it was that even though there was
24 extortion on the one hand, or union fraud on the other hand,
25 they were all related to -- for instance, the Gambino family,

1 just to throw out a familiar name, or the Genovese family, to
2 throw out another name.

3 But those were associations-in-fact. But even if
4 you didn't know all the actors, as you are not required to in
5 most conspiracy cases, you still have a general idea that if
6 you were associated with the family, there was a lot of bad
7 stuff going on. And it was -- and you had a pretty good
8 reason to believe that you were part of a larger whole, even
9 though you didn't know all the actors.

10 In this particular case, the only commonalty we
11 have, as counsel for the government has correctly noted, is
12 that they all involve allegations of bribery. Well, you know,
13 there could be all kinds of allegations that are the same.
14 That doesn't mean that they should all be joined under a RICO
15 umbrella. Just as what if these were involved in -- people
16 involved in, say, the garment industry in South America, where
17 I am given to understand, at least, that it is routine for
18 buyers to accept gratuities, which is a form of commercial
19 bribery. Commercial bribery is not a defense under most laws
20 that I am aware of in South America, indeed, in the better
21 part of the world. Indeed, in the better part of the world,
22 it is part of -- an accepted part of doing business. In the
23 subcontinent of Asia, they refer to it as "*baksheesh*," which
24 roughly translated in our lingo would be "grease," you know,
25 to make the wheels of commerce run smoothly.

1 And in this particular case, this was the way of
2 life. And that's exactly why the Peruvian court refused to
3 grant extradition as to the money laundering and the wire
4 fraud counts, because all of those money laundering counts
5 derivatively, but to the wire fraud count directly, was
6 basically to a commercial bribery offense.

7 And the thing that's counterintuitive about it, and
8 this will be the subject of another motion that we plan to
9 file down the road, is that they sent over the most serious
10 crime, which is based on this same theory, legal theory,
11 basically, either derivatively through money laundering or
12 directly through RICO predicates of mail fraud or wire fraud,
13 of deprivation of honest services fraud, which is, in effect,
14 commercial bribery.

15 The only logical explanation I have for that is they
16 didn't want to get too much in the United States' face, since
17 the United States is a substantial benefactor to Peru, so they
18 basically asserted their sovereignty as to, you know, four
19 throwaway conspiracies, but gave the government their other
20 conspiracy. And that is one of the bases that I plan to file
21 another motion or that we have agreed to recommend to the
22 Court a briefing schedule on.

23 So it seems to me that the government has chosen its
24 poison by using this RICO statute, which was intended to be an
25 organized crime statute. Honestly, that's what it was

1 intended for. I know it has been extended far beyond the --

2 THE COURT: Recognition, in your opinion.

3 MR. UDOLF: -- applications it was intended for. I,
4 myself, as a prosecutor have used it for those. But I don't
5 think I have ever seen a case quite as broad in scope as this.
6 And to think that the RICO statute, the strained acronym,
7 RICO, Racketeer Influenced and Corrupt Organizations, was
8 actually a tribute or an homage to Edward G. Robinson's
9 character in Little Caesar, whose name was Rico, the main --
10 in his breakout role as a gangster. So that's what it was
11 about.

12 But this relatedness, this pattern, all things that
13 the subsequent more recent case law have said that RICO must
14 be -- there must be some showing of that in order to sustain
15 the RICO charge, there is -- the only pattern is a similarity
16 of crime. And, indeed, RICO was designed to bring about
17 disparate types of crimes. And the fact that they are all
18 similar, you know, you can have someone who's in the garment
19 industry that basically pays bribes routinely, that does not
20 mean that everyone in the garment industry, for instance, in
21 Peru, would be part of a RICO conspiracy. There must be some
22 relationship or some knowledge of that. And I don't think
23 there is in this case, at least I haven't seen it thus far.
24 And so that's -- I would address Your Honor's concern --

25 THE COURT: You do realize that you started this off

1 by saying, "I don't have much to add to this." But I am just
2 going to let you go on. No, I am not belittling --

3 MR. UDOLF: It was a long flight up here.

4 (Laughter.)

5 THE COURT: I know. You should make it worth your
6 trip. I understand it.

7 MR. UDOLF: All right.

8 THE COURT: I understand your argument. But a lot
9 of what you say, though, quite frankly, Mr. Udolf, is policy.
10 But the gist of what you're saying, and I think Mr. Paulson
11 was alluding to the same, is that the government having used
12 the RICO statute in what some would say is an unprecedented
13 way, may have to pay the consequences for that in terms of
14 severance of defendants from each other at trial, or in
15 limiting the evidence that they put on to prove this
16 inordinately expansive application of the RICO statute. Is
17 that pretty much the gist of what your --

18 MR. UDOLF: Yes. And the fact is, Judge, if they
19 complain about the need for judicial economy, it would be much
20 more economy, because if they would just try, just as a for
21 instance, the CONMEBOL defendants, I mean, we are talking
22 about, I would think, no more than a week long trial. What's
23 going to make this trial longer and more complicated is the
24 fact that they have chosen to at least potentially throw in
25 the kitchen sink.

1 THE COURT: Well, bear in mind that there are two
2 issues here. One is the evidence that will be submitted as
3 part of the RICO conspiracy proof, and how that affects all
4 the defendants in ways that they say are disproportionate and
5 violate 404, 403, and are unfair, and then there are the, if
6 you will, inter-nesting fights between the defendants, three
7 of whom are in a CONMEBOL related conspiracy specifically
8 relating to two particular events, and then the two other
9 defendants, Mr. Takkas and Mr. Trujillo, who are involved in
10 separate conspiracies from everyone else.

11 So there's two categories of potential prejudice
12 that's being claimed. I started off the conversation with the
13 broader one, because it does in large part subsume much of
14 what applies to most of the defendants, but certainly as to
15 the CONMEBOL defendants, whom I have already asked the
16 question of how can you separate yourselves from each other,
17 really, and that's the second category.

18 But like I said, I see the issue, and we'll ask the
19 government to respond to this, is having used RICO in this
20 very expansive manner, and I think there's little debate that
21 it is unprecedented and quite unusual the scope of this RICO
22 conspiracy, should there be some consequence, sounds much more
23 punitive than it is intended to be, but should there be some
24 counteractive measure on the other side to ensure that there
25 isn't an unfairness in terms of the quantity, the quality, the

1 volume, I guess quantity, or the disparateness of the evidence
2 that's introduced as to these five defendants, given that we
3 are having a trial of only five of the 27 or so indicted
4 defendants. That's sort of the main question you are going to
5 have to grapple with.

6 So, Mr. Udolf, did you want to say anything else?

7 MR. UDOLF: No, I've blabbed on enough.

8 THE COURT: No, no, it is okay. I am just making a
9 little bit of fun.

10 All right. Next we have Mr. Takkas' attorney,
11 Mr. Mehler. Go ahead.

12 MR. MEHLER: May I speak from here?

13 THE COURT: You're very old school. Yes, you may.

14 MR. MEHLER: Your Honor, just to focus and pick up
15 on Mr. Udolf's point, the Court in teeing up the issue quoted
16 from the *DiNome* case, which appears on page 14 of the
17 government's brief. And after that, they cite six cases that
18 sort of prove this point.

19 And when you look up those cases, they are almost
20 identical, except for one difference. They all involve
21 organized crime, they all involve murder, except for one. So
22 all six organized crime, in the context that the others have
23 defended it, and five of them relate to murder. And, again,
24 it makes sense, if you're in a limited geographic sphere, it
25 is not unreasonable to believe. They know each other, they

1 may know what the others are doing. Here, my client,
2 Mr. Takkas, is not only not a soccer official, been out of
3 soccer for two decades, he's not even from the same
4 neighborhood, he's not even from the same country, he's not
5 even from the same continent. And they want to put him in
6 with the others.

7 It was so interesting, and I know -- I don't mean to
8 do anything other than call it to the Court's attention, when
9 you were having the colloquy, you said, oh, there are these
10 three CONMEBOL defendants, so you are really just arguing
11 severance for Mr. Trujillo. Well, then there's a fifth guy,
12 Mr. Takkas.

13 THE COURT: Right.

14 MR. MEHLER: And what's important about Mr. Takkas
15 is, he's not accused of taking any money here. Webb
16 supposedly took millions. There's no allegation here that he
17 took anything.

18 THE COURT: But is there not an allegation that your
19 client was the conduit for about a million dollars worth of
20 bribes that went to Mr. Webb?

21 MR. MEHLER: That is, in fact, the allegation, and,
22 you know, but, again, if --

23 THE COURT: There's a bank account identified even.

24 MR. MEHLER: Yes, Your Honor, but the question here
25 is, should he be -- should he be tried with those bank records

1 in a simple trial saying, you know, you -- these moneys came
2 into this account, you know, these are the inferences. If the
3 client wants to put on a defense, he will. And that's it.
4 He's not tried based on 38 different schemes over 25 years.

5 I think the Court wants me and wants all of us to
6 focus on specifics, and they call -- because of these
7 activities, they call my client an attaché, as if he was part
8 of some important diplomatic service. I think "gopher" is
9 really a better word. That's what he would be.

10 THE COURT: But a high level gopher. A million
11 dollars, you don't just entrust that to the man on the Love
12 Boat. I mean, that's a little different thing.

13 MR. MEHLER: Well, Your Honor, I would beg to
14 differ. I would beg to differ. Mr. Webb, as we pointed out
15 in our brief, is a --

16 THE COURT: Sad accountant.

17 MR. MEHLER: -- charming, not Mr. Webb, is not
18 that --

19 THE COURT: I'm sorry.

20 MR. MEHLER: But he's a charming man who has really
21 betrayed and fooled everybody, his country, his sport, his
22 family, his colleagues. And when he gets on the stand, I
23 predict he will betray the government, too, with his lies.

24 I think that, again, my client is from the Cayman
25 Islands, a tiny speck of a country that was ranked 201st out

1 of 209. There's a couple of soccer organizations that are
2 doing worse, but it is not exactly Chelsea or Arsenal in the
3 Premier League.

4 I think that, you know, Mr. Udolf said the
5 government has elected to use the statute, and they are saying
6 basically, "Tough luck. We have this statute, ha-ha, we can
7 do what we want." And the court has said, you know, is it
8 fair? And Rule 14 really assumes that joinder is proper as a
9 technical legal matter. But then it is very broad in the way
10 it -- you know, it says basically the court can do anything in
11 order to ensure a fair trial.

12 And I think that it is a rule that allows a very
13 broad remedy. And, yes, there should be a consequence here
14 for the government, choosing to stretch the RICO statute
15 beyond all -- what ought to be all recognizable limits. And I
16 end with this, you know, which we cited in our brief, Judge
17 Edward Weinfeld, who sat for so many years on the Southern
18 District bench, said, "A single joint trial, however
19 desirable, may not be had at the expense of a defendant's
20 right to a fundamental trial." And even *Zafiro*, the latest
21 Supreme Court case on severance, you know, requires merely
22 that the defendant demonstrate that joinder will appear to
23 prejudice him.

24 If my client is in with the others, the danger that
25 he will be swept up in the weeks long, 25-year scope of these

1 38 separate schemes, is overwhelming. He basically stands no
2 chance. And we are asking this Court to intervene and create
3 a barrier to that, for the purpose of ensuring his fair trial.

4 Yes, Your Honor?

5 THE COURT: Before you sit down, let me ask you two
6 questions.

7 MR. MEHLER: Sure.

8 THE COURT: Isn't the argument that you make so
9 emphatically about how severable Mr. Takkas' situation is,
10 he's in a different continent, a different country, involved
11 in a smaller conspiracy than everyone else, and everyone makes
12 a variation of that argument, isn't that a double-edged sword?
13 Because when you get to trial, isn't the argument that your
14 client is on a different continent, he is involved in a
15 different conspiracy, the evidence as to him is only this
16 small sliver of evidence, relative to the mountains of
17 evidence you have seen at this trial, can't that same argument
18 be used, very effectively at trial, I think, by a good lawyer
19 such as yourself and everybody else sitting around the table,
20 to basically make clear to the jury that there's very little
21 evidence as to everything else the government has as to
22 everyone else, and to keep it straight for the jury?

23 Because this is different in a way from the RICO
24 trials, the mob trials, where they are all in this very
25 closely geographic and familial and friendship relationship,

1 where here, you have a very plausible potent argument that I
2 think any juror would understand, is that Mr. Takkas is in an
3 entirely different continent, he's at the Cayman Islands, he's
4 nowhere near where these CONMEBOL defendants are, maybe he's
5 never stepped foot in South America, isn't that an argument
6 that actually says, we could keep this trial pretty focused as
7 to each defendant, and, moreover, wouldn't the government have
8 that as their main interest in order to have their convictions
9 survive appeal? Should they convict people, they are not
10 going to want to have a mosh pit of evidence and argue it
11 broadly or sweepingly as to all the defendants in order to
12 preserve any conviction that they obtain.

13 MR. MEHLER: Well, Your Honor, here I can really --
14 I understand the argument, it is a logical argument, and I
15 guess my only response would be based on experience. Having
16 had close to 35 years, almost equally in government and
17 defense, you know, one likes to think that a jury getting a
18 limiting instruction will listen to it perfectly. But, you
19 know, maybe I've become a little too cynical in my dotage. I
20 think that --

21 THE COURT: And not even a limiting instruction. I
22 am not relying on them -- on my instructions, rather, I am
23 relying on all of you to do your jobs as vigorously as you
24 have and make it clear to the jury that there's only this
25 little bit that applies to Mr. Takkas, this little bit that

1 applies to Mr. Trujillo, and so on. And the government,
2 really, to do the same in order to have a viable conviction,
3 assuming they get one.

4 MR. MEHLER: Well, again, reasonable minds can
5 differ on that. My own very strong gut, based on, you know,
6 more than a year in weeks in a courtroom, is that that is
7 unlikely to happen. That if you have jurors going back there,
8 they will say, "That guy, yeah, what was he doing here? Well,
9 did you hear? He did this. It is, you know, and he was
10 associated with the guy Webb who was horrible. You know, he,
11 obviously -- there must be something. Why would he" -- and
12 you say, "No, no, that will never happen, they'll make" --

13 THE COURT: That has to happen as to Mr. Takkas.
14 That I get. That's the case against him.

15 MR. MEHLER: Sure, sure. But he's going to be
16 testifying, you know, more broadly.

17 So, again, reasonable minds can differ. As a
18 practical matter, I don't see it. I think the government uses
19 the RICO statute. Not accusing them of bad faith, I just
20 think it is there, you know, they do it because they can. You
21 know, it is like climbing Mt. Everest. It is there, they use
22 it. It's the nuclear bomb. It has nothing to do with
23 organized crime, but it really helps you to get a conviction.
24 And that's what we worry about here.

25 THE COURT: The kitchen sink approach.

1 MR. MEHLER: The kitchen sink.

2 THE COURT: One last question. You cited to me
3 Judge Ross' decision in *Asaro*, A-s-a-r-o. Doesn't that case,
4 though, really dictate an opposite result? Because I think it
5 represents a line of cases, which many of you've relied upon,
6 especially in the mob context, for where severance is
7 appropriate, where you have such a great disparity in the
8 seriousness in the type of crimes that each of the defendants
9 are accused of committing, even though they are part of the
10 same RICO organization or conspiracy.

11 And the government has addressed this point, and I
12 am struck by *Asaro* because Judge Ross, and you rely heavily on
13 her decision, makes clear that the main focus of her severance
14 decision is because the two leaders who were to be tried with
15 the two lessers, if you will, of this organization, had
16 committed or were being charged with murders and attempted
17 murders, whereas the two defendants to whom she did grant a
18 severance had been involved in nonviolent offenses. Isn't
19 that really the more appropriate situation where severance,
20 based on inflammatory or prejudicial in terms of type of
21 crime, the type of crime that jurors can't see beyond, and
22 would tend to sweep everyone into the same bucket, isn't that
23 the more appropriate place for a severance than this one where
24 everyone's accused of bribery, money laundering, wire fraud?

25 MR. MEHLER: Well, I mean, I think that there was a

1 symmetry in the *Asaro* case because in those cases there were
2 charges of violent crime against the one defendant, and then
3 there was an extortion charge against another, which is
4 considered a violent crime as well. Here you have so-called
5 white collar crimes --

6 THE COURT: Across the board.

7 MR. MEHLER: Across the board, and I think that
8 there is also symmetry because the *Asaro* case also involved a
9 situation of a lot of different things going back decades.
10 And I think that Judge Ross felt this was a very -- the guy
11 who was severed, this was a very isolated incident involving a
12 period of time.

13 And the Court said to me, "Well, Mr. Takkas is
14 associated with Mr. Webb, he got the money in." What if the
15 Court saw -- hears evidence, as I believe it will, that the
16 guy got no money for it? That's just dumb. Why are you, if
17 you are participating in a conspiracy to launder money --
18 there were people here, I know there was a guy named
19 Margulies, I believe, was a money launderer. He charged a
20 percentage, right?

21 There was a relationship, the evidence will show,
22 between Mr. Webb and Mr. Takkas, that was a relationship that
23 went back a long time. They were proud Caribbeans.
24 Mr. Takkas is originally from England, but, you know, Mr. Webb
25 was sort of an up-and-comer. There was a lot of pride in that

1 community that he might rise to the president of FIFA. And I
2 think this Court can see that, and I think the evidence would
3 show, that that's what motivated him, this desire to help him.

4 Now, you'll say, "Well, what did he get the money
5 for?" Well, there's going to be a trial, and there is an
6 explanation for that. I promise the Court.

7 But, again, I ask the Court --

8 THE COURT: I can't wait.

9 MR. MEHLER: -- something's wrong here that
10 everybody who's charged with getting lots of bribes, and this
11 guy got nothing. That's going to be an interesting trial.

12 THE COURT: Right. But that's what trials are for.
13 I mean, I think we are skipping over the main issue, which is
14 I was just trying to say that isn't it true that in most of
15 the cases that have been cited where severance has been
16 granted, it is more on the basis that the prejudice that's
17 alleged or that prompts the severance is really one of the
18 kinds of crime, as opposed to even the evidence, and I know
19 there's been one Judge Glasser case cited to me, but the
20 volume of evidence or the disparate activities involved.

21 In other words, in most of the RICO cases involving
22 the mob, you have different members of the mob or factions of
23 the mob doing all sorts of very separate criminal activities.
24 That's the nature of mob activity, that is part of the reason
25 that the RICO statute was passed, was to try to bring them all

1 together in some semblance of an association-in-fact. I am
2 not necessarily going to enter into this policy debate with
3 Mr. Udolf on that issue, and you'll have your Rule 29, I
4 understand that, as Mr. Paulson said, to make.

5 But I am just trying to get to the point that most
6 of the cases that have been cited to me have to do with the
7 prejudice that emanates from the differences in severity of
8 the crime itself, as opposed to the volume of the crime or the
9 separateness of the activity.

10 MR. MEHLER: Sure. And I would say, in response --

11 THE COURT: Volume of evidence. Not volume of
12 crime.

13 MR. MEHLER: I would say that there's a small volume
14 of evidence, and the fact that, you know, there are charges of
15 bribe receiving by others, and, you know, I think the evidence
16 will show that my client got nothing. The fact that the
17 others are all members of national heads of soccer
18 organizations or the head of CONMEBOL, my client was the
19 general secretary of Cayman Islands soccer two decades ago and
20 has been out of soccer so that they have to use the
21 self-deprecating, self-created word "attaché" to get him in, I
22 suggest that that is a difference of substance and, indeed,
23 severity, that will have real consequences if the Court
24 doesn't step in to help ensure fairness. Thank you.

25 THE COURT: Thank you, Mr. Mehler.

1 All right. Next we have the attorney for
2 Mr. Napout, Mr. Pappalardo.

3 MR. PAPPALARDO: Thank you, Your Honor.

4 If I may, Your Honor, I am not going to go over any
5 of these arguments, but I need to apply the facts as we know
6 them today. And the other dimension that we have is we are
7 asking for speedy trial --

8 THE COURT: Yes.

9 MR. PAPPALARDO: -- so that I am not trying to be
10 repetitious here.

11 As the Court knows, we filed our motion for speedy
12 trial on October 31 of last year, and we are hearing it today.
13 So some of the information contained therein with respect to
14 dates and things like that may be a little off.

15 Your Honor, we have a superseding indictment here
16 with 27 defendants, 92 counts, 15 separate schemes, over a
17 24-year period. Mr. Napout is in five counts and is alleged
18 to be involved in two schemes. The important point is that
19 there were no specific factual allegations that we have seen,
20 either in the indictment or based upon any of the discovery
21 we've seen so far, that Mr. Napout agreed to enter into any
22 conspiracy.

23 From the beginning in this case, Your Honor,
24 Mr. Napout has asserted his right to a speedy trial. From the
25 time of the initial appearance, in fact, before that, he was

1 the only one who immediately waived extradition from
2 Switzerland. He did it as quickly as he possibly could. At
3 the time of his initial appearance, we even objected to any
4 excludable time because of our insistence upon getting a
5 speedy trial.

6 On every hearing since then, particularly before
7 Judge Dearie -- by the way, this is the second motion for a
8 speedy trial we filed. We filed one in March of 2016, also.

9 At every hearing we've been on the record opposing
10 any kind of delay trying to accelerate the case as to
11 Mr. Napout. We contend, Your Honor, that severance in this
12 case for Mr. Napout is necessary to protect his right to a
13 speedy trial. Absent being joined with codefendants, Napout's
14 speedy trial clock expired on May 4, 2016.

15 THE COURT: I have to stop you. I've read your
16 papers, and I've, of course, heard your speedy trial argument
17 once before.

18 There are so many different tolling or exclusionary
19 provisions that seem to apply to Mr. Napout's case, but let me
20 just focus on one, and this is the one I am sort of
21 particularly curious on what your response is. You have filed
22 on behalf of your client four motions, at least, and I am not
23 even including any of the bail modification motions. I don't
24 consider those as impeding or delaying in any way the trial in
25 this case. But you filed a motion to dismiss the indictment,

1 you filed a motion for a bill of particulars, you filed a
2 motion disputing discovery issues, namely a claim of common
3 interest and attorney-client privilege, that was only decided
4 on March 10, 2017, by written order, but that warranted and
5 required an evidentiary hearing and testimony and substantial
6 briefing, and now you are filing a severance motion. I assume
7 you will also have motions to file in limine, perhaps
8 suppression.

9 With all of that process that you have sought to
10 employ on your client's behalf, which is absolutely your
11 right, if not your duty to do, how can you now turn around and
12 say your speedy trial date would have run back in May of 2016?
13 Every single one of those motions allows me to exclude the
14 time while they are being resolved, or else you wouldn't get
15 to file them if I didn't stop that speedy trial clock. You
16 have to brief them, the government has to respond, and I have
17 to decide them, after giving you oral argument, which has
18 happened with every motion. So I just don't understand how
19 you can even make this claim.

20 MR. PAPPALARDO: It hasn't happened with every
21 motion, Your Honor. First of all, we filed a motion for a
22 bill of particulars, we didn't argue that case, and you
23 allowed that motion in part without argument.

24 THE COURT: But we had an argument on the motion to
25 dismiss, which included the bill of particulars. So I don't

1 think I prevented you from arguing that, but be that as it
2 may, you had an argument on the motion to dismiss, which was
3 conjoined with your bill of particulars request. And I
4 granted your bill of particulars request in part.

5 MR. PAPPALARDO: Exactly.

6 THE COURT: Okay.

7 MR. PAPPALARDO: But, Your Honor, what I would
8 suggest to the Court are two things. One is, that a motion to
9 dismiss did not delay anything. There were other motions to
10 dismiss here. It was a clear motion, yes, you took argument
11 and you denied the motion.

12 THE COURT: But I think you're missing my point.
13 Every single one of these motions you file under 3161(h)
14 allows me to, as I think is appropriate or else I can't
15 resolve them and you can't brief them adequately, to stop the
16 speedy trial clock. So I am just quibbling with you about
17 your calculation of the speedy trial time. If you didn't want
18 to file any motions whatsoever, I guess in theory your time
19 could have stopped. And then your argument to me is why I
20 made you brief them lockstep with everyone else. That's a
21 different argument.

22 But you can't actually argue to me as a matter of
23 law that after filing all these motions, your speedy trial
24 time ran back in May of 2016. That, I think, is simply
25 inaccurate. If you want to argue that it was incorrect of me,

1 or somehow violated Mr. Napout's speedy trial right to make
2 you brief it on a schedule with everyone else, fine, that's an
3 argument.

4 But I think to ignore the fact that the time must
5 stop, I think, in order to give you a fair opportunity to
6 brief the issues that you chose to raise for your client, as
7 you should, I don't think you then get to argue that somehow
8 speedy trial ran back in May 2016. That just doesn't compute,
9 quite literally, under 3161(h).

10 MR. PAPPALARD0: Well, Your Honor, I would
11 respond -- I understand the Court's point. I would
12 respectfully disagree for a couple of reasons.

13 The first is, we did file the motion. The motion
14 wasn't heard. We filed it on October 31. You indicated --

15 THE COURT: The speedy trial motion?

16 MR. PAPPALARD0: Yes. The speedy trial motion. And
17 you said the government doesn't have to respond until they
18 respond with everybody else.

19 Your Honor, with regard to the motion relating to
20 the attorneys in the common interest privilege, let me point
21 out to the Court one simple thing. We were asked by the
22 government to provide them with a list of attorneys who
23 represented Mr. Napout. And we did.

24 We were concerned, because CONMEBOL had indicated,
25 and we received this in writing, that they were going to waive

1 the attorney-client privilege. So when we -- across the
2 board. No limitations. Based upon that, and based upon what
3 we asserted was a common interest privilege --

4 THE COURT: Which Judge Levy denied.

5 MR. PAPPALARDO: But, Your Honor, based upon that,
6 we had a hearing. At the beginning of that hearing,
7 Your Honor, I asked the Court to determine what it is we were
8 there to argue. Because subsequent to CONMEBOL's blank waiver
9 of the attorney-client privilege, they modified the waiver
10 and --

11 THE COURT: I am not disagreeing with you about any
12 of that.

13 MR. PAPPALARDO: But that's not on us. That's what
14 I am trying to say to you.

15 THE COURT: No, but it doesn't matter if it is on
16 you or not. You could have obviously waived and said, "Okay,
17 fine, if you are not going to honor a privilege, we are not
18 going to fight it." But you chose, and I am not saying
19 inappropriately, you have to make whatever strategic decisions
20 you think are correct for your client, you chose to argue that
21 Mr. Napout was entitled to a common interest privilege over
22 the position of CONMEBOL. Once you did that and you filed a
23 motion, the clock stops, to allow that motion to be heard,
24 under 3161(h). Why is that not appropriate?

25 MR. PAPPALARDO: If I may, Your Honor, because in

1 that case, again, Your Honor, the blanket waiver of privilege
2 was then superseded so that it didn't include the only thing
3 covered by the common interest privilege we were asserting,
4 which were commercial transactions. So, quite frankly, there
5 was no need for a hearing because they didn't waive the
6 privilege with regard to commercial transactions.

7 That wasn't our -- the only thing that the common
8 interest privilege touched upon, if it existed at all, was
9 commercial transactions. Subsequent to their blanket waiver,
10 they said, "Oh, no, no, it doesn't include commercial
11 transactions." As far as I was concerned, then it's over.

12 THE COURT: Well, you may disagree with Judge Levy
13 to having a hearing to fully flesh out the issues. But,
14 again, the principle is nonetheless the same. The statute
15 provides that time will stop while motions are being briefed
16 and resolved.

17 So, again, your speedy trial argument, your
18 technical argument about violating speedy trial just doesn't
19 hold because there have been periods stopped throughout this
20 case, from the beginning of at least my first encounter with
21 everybody, until now, while all of these motions, the motion
22 to dismiss that you wanted to file, the bill of particulars
23 motion that you did file, the severance motion that you have
24 filed, the time has stopped. You cannot include that as any
25 kind of violation of speedy trial.

1 The minute you say, "I want to file a motion," and
2 the Court, as it should, allows you to do that, we are allowed
3 to stop that clock. I don't understand how you can say, "I
4 want all this process, and yet I still want my speedy trial to
5 have run over a year ago or almost a year ago." That's just
6 not accurate under the statute or in terms of the process or
7 the procedure that's been followed in this case, initiated by
8 you, in large part, and some of the other defendants who want
9 to file other motions.

10 And, moreover, I think the case was declared complex
11 from the beginning. Do you really take issue with that, when
12 you are coming in here and saying it is a 236-paragraph
13 indictment, it involves millions of pages of discovery? You
14 would concede it is complex, no?

15 MR. PAPPALARDO: Your Honor, the case was declared
16 complex by Judge Dearie simply based upon the discovery.
17 That's what he said.

18 THE COURT: Well, I mean, okay, we can revisit it,
19 but has it gotten any less complex, in your mind?

20 MR. PAPPALARDO: I believe it has, Your Honor. Most
21 of the defendants have pled guilty. There are five defendants
22 left.

23 THE COURT: Who are all arguing it is
24 extraordinarily complex with millions of pages of evidence
25 that can't come in against them. In order to make that

1 assessment and that argument, you have to go through those
2 millions of pages of documents and read everything the
3 government's giving you. This case is unavoidably complex.
4 It involves evidence coming in from all over the world. I
5 understand that some of the provisions to exclude time, toll
6 the speedy trial clock are cabined in by reasonableness in a
7 year time limit. Understood. But you have four different
8 ways in which this case has to slow down. Most of which, if
9 not all of which, inures to the benefit of the defendants.

10 And beyond that, explain to me how your client has
11 been prejudiced by this?

12 MR. PAPPALARDO: Well, that's a different story.
13 I'll get to that, Your Honor.

14 THE COURT: Okay.

15 MR. PAPPALARDO: But the foreign evidence is only
16 for a year.

17 THE COURT: Understood. That's what I just said. A
18 year. Yes. I understand.

19 MR. PAPPALARDO: And we're well beyond that now.

20 THE COURT: For sure. I agree with that, and I
21 think the evidence that's come in, that's what you have in
22 front of you, but beyond that we have the overall complexity
23 of this case of you all getting through that evidence. I
24 don't think anyone would have been happy if after that year I
25 said, "Okay, we are going to trial tomorrow. You have the

1 evidence, the government's time has run out." Nobody wanted
2 to have a trial in this case within that short amount of time,
3 and then the question becomes, must you go to trial with the
4 rest of the defendants. And that's your argument. Being
5 joined with them has somehow prejudiced your client.

6 MR. PAPPALARDO: It is my argument, Your Honor, that
7 it does prejudice my client based upon two things. One of
8 them is the facial aspects of the indictment, what the
9 indictment specifically alleges, and the other is the review
10 of the discovery that we've received to date as it relates to
11 Mr. Napout.

12 And what I can say to you, Your Honor, is that
13 the --

14 THE COURT: By the way, I should correct myself. It
15 is not 230 paragraphs, it is 500-something paragraphs in 236
16 pages or something like that.

17 MR. PAPPALARDO: Your Honor, we have had -- there's
18 nothing in this indictment, as it relates to Mr. Napout, that
19 suggests that he joined the conspiracy. There's absolutely
20 nothing. In this case, Your Honor, we have seen --

21 THE COURT: Are you switching arguments now to the
22 severance issue, or are you staying on the speedy trial issue?

23 MR. PAPPALARDO: Well, they really go together,
24 Your Honor, because antagonistic defenses, which I will get
25 to, goes to the issue of speedy trial.

1 But the quantum of the evidence, Your Honor -- the
2 evidence is massive. We've conceded that. Everybody
3 understands that. The evidence against Mr. Napout is not.
4 And with respect to that, there are no allegations in the
5 indictment that Mr. Napout was part of the -- part of the
6 conspiracy. He is -- there are no documents that are referred
7 to in the indictment, there are no overt acts in the
8 indictment, there are no financial documents in the
9 indictment, there's no forfeiture count in the indictment as
10 to Mr. Napout. There are no comments that explains what it is
11 that he supposedly did to either be part of the conspiracy or
12 how he interacted with his coconspirators.

13 And what it says, Your Honor, what it says is that
14 Mr. Napout agreed with others on one conspiracy to take money
15 and another conspiracy to get money, basically. And that's
16 what it says.

17 THE COURT: Are "take" and "get" different?

18 MR. PAPPALARDO: Yes.

19 THE COURT: Okay.

20 MR. PAPPALARDO: In one they are alleging that there
21 was an agreement to get money, which presumably wasn't paid.
22 And in another one, that there was money paid.

23 But there is no wire transfers of money into his
24 bank accounts. All of the other defendants or many of the
25 other defendants, Your Honor, have an incredible laundry list

1 of evidence that supports what's contained in the indictment.
2 That's not the same for Mr. Napout. And we've looked at the
3 discovery. The discovery doesn't help us on that, Your Honor,
4 even with the Court's allowing of the bill of particulars.

5 And for those reasons alone, we would tell you that
6 it is unfairly prejudicial for him to be tried with others.
7 Because it is not a question of whether you can argue and
8 cross-examine witnesses, it is really a question of a jury's
9 perception, and being lumped together in a prejudicial way, in
10 an unfairly prejudicial way, with others, where there's a
11 large quantum of evidence. That's what we are arguing,
12 Your Honor.

13 The other thing is, you have to look at the
14 antagonistic defense piece of this.

15 THE COURT: Yeah, I'm interested in this. Go ahead.
16 Tell me how it's antagonistic.

17 MR. PAPPALARDO: If you look, Your Honor, at page 13
18 of our brief, where we have detailed for the Court the tapes
19 in this case --

20 THE COURT: Yeah, I am aware of the one you say is
21 exculpatory.

22 MR. PAPPALARDO: Well, there are two that are
23 exculpatory, Your Honor. Those are the only two. There are
24 147 tapes, containing a total of 113 hours and change of
25 recordings. Napout spoke six times, for a total, in the

1 aggregate, of seven minutes.

2 On those -- on the only two tapes of substance, the
3 first one on May 1, 2014, he basically says, it is there in
4 the brief, Your Honor, he says that "Anybody comes to you
5 saying that I am in on anything, I'm not. And you know that."

6 And the person agrees: "Yes, I know that."

7 "And they are liars." And there's an agreement on
8 that.

9 That's an antagonistic defense, Your Honor.

10 THE COURT: Vis-à-vis who?

11 MR. PAPPALARDO: Vis-à-vis codefendants, Your Honor.

12 THE COURT: But this is not a universe where there
13 was a singular crime that had to be committed by the only two
14 people in the room. He could have not taken a bribe, and the
15 other people took a bribe. He may disagree that a testifying
16 coconspirator said, "Yes, he took a bribe with me," but that's
17 what you cross-examine on. That's not an antagonistic
18 defense. An antagonistic defense is one where the jury has to
19 choose one of the defendants as having done the crime. They
20 could find based on the evidence that you've just cited, or
21 other evidence, that your client didn't commit the crime, and
22 that anyone who says he did is a liar. Flat out. Simple,
23 right? That's not antagonistic. That's challenging the
24 evidence that the government's putting forward.

25 MR. PAPPALARDO: Your Honor, the issue isn't whether

1 he -- somebody's saying he took money. What they're saying
2 is, that they understand that he was going to take money,
3 which he's -- which he is --

4 THE COURT: So same thing. It is not mutually
5 exclusive. The point is the jury could decide, "You are
6 right. Somebody may say he agreed to take money, but they are
7 just lying." It doesn't mean that they have to then choose
8 the person who said he agreed to take money is the only other
9 person. In other words -- and I don't even know if you are
10 talking about any of the defendants sitting here, which I --
11 actually, it would only have to be the other two gentlemen who
12 are involved in the CONMEBOL conspiracy. And you haven't said
13 to me that you expect either of them, you know, or the
14 evidence to come out that one of the three of you, or even two
15 of the three of you, had to have done this in order for it to
16 have happened.

17 It seems to me that the theory is some group, either
18 the entire or some subpart of the group, took bribes. That's
19 not -- that's not antagonistic. That's just challenging the
20 government's evidence as to whoever says your guy agreed to
21 take money or took money.

22 MR. PAPPALARDO: Your Honor, I don't know who those
23 other people are, and, certainly, the discovery doesn't
24 provide it.

25 THE COURT: It doesn't matter. It is the nature of

1 the claim. This isn't a zero sum total situation. Like I
2 said, two people in the room, drugs disappear, one of them has
3 to be the person. So, therefore, if the two defendants who
4 are in the room go to trial, they have to accuse each other in
5 a way that the jury cannot avoid convicting one of them,
6 right?

7 This is not that situation. It is more like you
8 guys all sitting around the table and, you know, my deputy
9 says three of you decided to take a bribe. Well, she could
10 just be wrong. And it doesn't mean that by virtue of that the
11 other people have to get convicted. So it is not
12 antagonistic, you know what I am saying, under the law.

13 MR. PAPPALARDO: Your Honor, with respect to *DiNome*,
14 we argue that in our reply brief, and explain why it shouldn't
15 apply in this case. But, basically, in that case, what the
16 Court did was, in that case, of course, nobody was asking for
17 a motion to sever. The Hellmans decided that -- in fact, the
18 court implored them to sever the case, and they wouldn't do
19 it. And once the RICO conspiracy was dismissed, basically,
20 the case was a mistrial. And that is what we are looking at
21 here in the context of Napout.

22 You know, Your Honor, in the indictment, there's no
23 evidence that Mr. Napout arranged to receive or got any
24 tainted funds. He's not alleged to have attended any meetings
25 on or about August 2013, either in Buenos Aires or London,

1 like others, that -- or Datisa.

2 There's -- he's not named in allegations detailing
3 the use of any kind of financial institutions in the United
4 States to make payments. That's not in the indictment. But
5 it is with others.

6 He's not alleged to have deposited any illicit funds
7 into any account of his or any account, period. Napout's bank
8 accounts or properties are not listed in the forfeiture
9 portion of the indictment.

10 He's not named as having committed any specific acts
11 of bribes or kickbacks.

12 He was not recorded or intercepted participating in
13 any conspiracy. In fact, it is exactly the opposite.

14 He's denying involvement more than a year before the
15 original arrest took place in May of 2015.

16 THE COURT: You're aware, of course, that the
17 government is going to make the contrary argument that that
18 was a false exculpatory statement that is indicative of guilty
19 conscience versus something else.

20 But, I mean, here's my -- I understand your
21 fundamental point, which is that there's a disparity in the
22 volume of evidence that's going to be brought to bear on your
23 client, and, therefore, it is unfair to try him even with his
24 other CONMEBOL defendants, because the jury won't be able to
25 sort out what evidence applies to him as opposed to what

1 evidence applies to not only the CONMEBOL defendants, but all
2 of the other participants in the RICO conspiracy. I
3 understand your argument.

4 I don't agree with it because I think this happens
5 in cases all the time, that there's going to be disparities in
6 evidence, and that's what your job as the defense attorney is
7 to do at trial, which is to point that absence of evidence,
8 just as you've done quite effectively here, to try to argue
9 that there's no evidence to convict your client on.

10 So that's -- I understand your fundamental point.

11 MR. PAPPALARDO: I appreciate that, Your Honor.
12 Just let me make one more comment, please.

13 In March of last year, I pointed out, based upon the
14 discovery, that there was only one tape that dealt with
15 Mr. Napout, where he was saying "hello" in front of a crowded
16 elevator.

17 At that point in time the government confirmed that.
18 That's all there was with respect to Mr. Napout. When we
19 listened to all of the tapes, they failed to identify the
20 exculpatory portion. So they argued with, you know, with
21 certainty that he was only on one tape. So if they argue
22 today that it must be false exculpatory because a year before
23 the indictments he must have known about this, I mean, I am
24 sure that they, you know, that's an argument they might make.
25 But we see no evidence of that. If they had evidence of that,

1 Your Honor, don't you think that would be in the indictment?

2 THE COURT: Not necessarily. I mean, you all know,
3 the government doesn't lay all their cards on the table in an
4 indictment, to be sure.

5 MR. PAPPALARDO: I would like to see some cards,
6 Your Honor.

7 THE COURT: No, understood. But bear in mind that I
8 am just taking a wild guess, not based on anything I know.
9 But, obviously, this case is probably going to involve some
10 cooperators who were in the room, and you won't get some of
11 that evidence until later.

12 I understand, this is seemingly -- we can have a
13 whole policy debate led by Mr. Udolf about whether that's fair
14 or not, but I think that might be the reason that some of this
15 evidence -- or you are not seeing all the evidence, put it
16 that way.

17 MR. PAPPALARDO: Well, as of March, they didn't know
18 about it. But what I am saying to you, Your Honor, is that
19 the entire case against Mr. Napout is dependent upon
20 cooperating witnesses.

21 THE COURT: That may well be so. But that doesn't
22 make it any less potent evidence, right? It is evidence, to
23 be sure.

24 MR. PAPPALARDO: No, but, Your Honor, it goes
25 exactly to the heart of severance and unfair prejudice.

1 THE COURT: No, quite the opposite, actually. If
2 you have a cooperator who's testifying about two, the same
3 events, or tournaments, the ones that your client and two of
4 the other defendants at the table are charged with, then the
5 efficiency argument really runs in favor of the government.
6 Why have a cooperator testify more than once as to the same
7 three defendants? That would be inefficient, at least.

8 So cooperator testimony, if you are talking about a
9 person who was familiar with the negotiation for these two
10 tournaments that your client and two other defendants are
11 charged with accepting bribes in connection with, it seems to
12 me they have the better of the argument about why they should,
13 at least those three defendants, should be tried together.

14 But I want to hear from the government. This is
15 sort of the mysterious question of what evidence does the
16 government intend to prove, at least in categorical terms.
17 Because -- and thank you, Mr. Pappalardo. I didn't mean to
18 stop you. I assume you're done?

19 MR. PAPPALARDO: Thank you.

20 THE COURT: Let's turn to the government. Because
21 the big looming question is, how much evidence does the
22 government really intend to put in to prove the RICO
23 conspiracy? I have given you some idea of my own doubt about
24 the potential overbreadth, given how the government has chosen
25 to apply the RICO doctrine, which is fairly singular and

1 unusual. It goes well beyond the typical RICO case that we
2 see in this district. I am not saying it's never been done
3 before. But the scope of it, geographically and otherwise, is
4 certainly great.

5 So let me just tee this up for you, Ms. Mace.

6 I may well agree with you on the legal principle
7 that because you've alleged a RICO conspiracy, you are allowed
8 to put in all the evidence that would prove the existence of
9 the enterprise, as well as the pattern of racketeering. That,
10 in theory, is a correct proposition. But it has prudential
11 limits, right? You can't do this to the point that it really
12 does deluge the defense with irrelevant evidence about the
13 culpability of the bad acts of other members of this
14 conspiracy. Would you agree with that?

15 MS. MACE: Yes, Your Honor.

16 And I think that I want to go right to the heart of
17 the issue, as Your Honor has identified it. What's the
18 consequence to having charged a broad RICO conspiracy in this
19 way? And there certainly are consequences.

20 I think the main consequence is that the government
21 faces an enormous burden of proof here. We have to prove the
22 racketeering conspiracy that was returned in the indictment by
23 the grand jury. And so counsel for Mr. Takkas says the
24 government just does it because it can. It charges these
25 broad RICOs because it can. But, actually, that's not the

1 situation here. The problem is the nature of the crime. And
2 that's what the grand jury identified, and the indictment that
3 was returned is based on the type of crime that's at issue
4 here. And so we don't have a situation where you have little
5 discrete incidents of bribery or corruption, you have
6 something that is a bigger, broader problem. And that's what
7 the RICO statute was designed to combat. And so it is charged
8 in that way.

9 THE COURT: Let me ask you a specific question. I
10 am only interrupting you because this could easily get very
11 macro as opposed to I want to get a little more micro with
12 you. There are 15 schemes that have letter names in the
13 indictment. Is it your intention, and I know that you don't
14 know exactly what case you will put on, to prove the existence
15 of every one of those schemes as part of the RICO conspiracy?

16 MS. MACE: No, not necessarily. And so I think
17 what's important is to place us in context or procedurally
18 where we make those determinations.

19 THE COURT: Okay.

20 MS. MACE: So right now, where it's a question of
21 just whether there's severance. And I want to talk a little
22 bit in a moment about the types of cases in which courts grant
23 severance in the RICO context. But then there's the separate
24 issue, Rule 403, and that's a very real issue, and the
25 government acknowledges that, and that's something that we

1 will address to the Court, and I think that's basis of a
2 separate motion to say, "Okay, here we have, these are the
3 defendants going to trial. We have five defendants." And how
4 are we going to prove what we have to prove based on the
5 indictment and a pattern that is charged.

6 And so what we anticipate doing, as we do in other
7 RICO cases, is that we say the conduct of the specific
8 defendants is this, and we also intend to prove other
9 conduct -- other crimes.

10 THE COURT: As part of the pattern of racketeering.

11 MS. MACE: As part of the pattern.

12 And so we always detail that in a motion for the
13 Court to say, these are the other things that we need to prove
14 in order to prove the pattern, to show relatedness, to show
15 the threat of continuing activity. And so we will detail
16 that, and the defense can argue that something's too
17 prejudicial, or it's cumulative. And we are just not at that
18 point yet. But I can tell you, Your Honor, we are not going
19 to prove up every single scheme because we won't need to. And
20 it may be if there's fewer defendants by the time we get
21 there, it would be even less. We won't do more than what is
22 necessary for lots of reasons, one, efficiency, one, as
23 Your Honor pointed out, we don't want to have the evidence
24 sort of dwarf who is there, we will focus on who's there. But
25 we have to prove the pattern and we'll do that. And it's been

1 charged this way, and we are entitled to prove the pattern.

2 So I would propose the specific 403 issues should be
3 decided by the Court, but that would be the basis of a
4 separate motion. The question here is whether the way it is
5 charged requires severance, and I think that's a separate
6 issue.

7 THE COURT: Let me ask you one question. Is it
8 conceivable that you would proceed to trial and you would set
9 this forth in the documents you are mentioning, that you would
10 only prove the four schemes that are alleged against these
11 particular defendants; is that conceivable?

12 MS. MACE: I don't think so, Your Honor, because one
13 of the things that we need to prove is the relationship and
14 the relatedness over the pattern, which also goes to proving
15 the enterprise -- corruption of the enterprise itself. And
16 there are certain types of schemes that will be the basis
17 of -- individual witnesses will describe multiple schemes that
18 show that this is a pattern of continued activity across the
19 region, both North America and South America. So it is not
20 that you have a one-off instance of bribery in World Cup
21 qualifying matches, but something that happens over and over
22 again. And that's why this is such a big problem. It's not
23 that there's one guy who took a bribe here and it's totally
24 unrelated to that. We have to prove that they're related and
25 show we are going to do that through the evidence and the

1 pattern.

2 THE COURT: Okay. Go ahead.

3 MS. MACE: So I think as I noted, there's a separate
4 issue of when severance is required, which is a little
5 different than the evidentiary issue. And there are some
6 cases in the RICO context in which severance is granted.
7 Those are generally two contexts. One, sometimes the court
8 will grant it when a case is a mega trial. It is so huge that
9 it just can't be managed. And so you have a couple cases
10 cited by the defendants, *Gallo* and *Andrews*, and *Casamento*,
11 where you have 20, 30 more defendants and trials that lasted
12 more than a year. That's not the situation that we have here.

13 Everyone cites the statistics, they say how many
14 paragraphs, how many pages, how many defendants. What we have
15 is a five-defendant trial. That's not that much.

16 THE COURT: But that's what they're saying. So,
17 therefore, how many schemes will you introduce against them?
18 That's their concern.

19 MS. MACE: Which is the evidentiary question.

20 THE COURT: Correct. Okay.

21 MS. MACE: So if we had all 40-plus defendants,
22 people and entities that have been charged in this case, all
23 here, I think we would agree with you, we can't have a trial
24 where you have 40 cross-examinations on every witness. It is
25 just too unwieldy. And so there's some cases like that. And,

1 interestingly, when they have granted severance, they break it
2 into trials that look a lot like this one. You have -- which
3 one was it.

4 I think it was *Andrews*, the El Rukns case in
5 Chicago, you had 20-plus defendants, and it is broken into
6 trials of five or four defendants. Exactly the sort of size
7 we have here. And we're not talking about a year or two-year
8 long trial. Much shorter than that. Something that's
9 manageable. So I think this case does not fit in those sets
10 of cases that the defendants have cited.

11 The other type of case where you sometimes have
12 severance is, as Your Honor pointed out, where there's certain
13 types of crimes that are so heinous that they then reflect on
14 the defendants who are involved in a different type of
15 context. So the *Asaro* case is one of those. You had a
16 40-year racketeering conspiracy, really awful murders. And as
17 evidenced in a recent trial in this courthouse, you had
18 evidence of moving a body, you have all sorts of very
19 troubling crimes, and then you had a couple defendants with
20 extortions in a discrete period of time. Severance was
21 warranted, Judge Ross found there.

22 In other cases cited by the defendants, the same
23 sort of divisions have been made. You have sometimes the
24 defendants alleged to have participated in murders or tried
25 separately from extortions, or gambling, separated off. You

1 have those sorts of situations.

2 Here, we pointed out, that all the defendants are
3 alleged to have participated in the same type of conduct. We
4 have a lot of reaction in the reply brief to that, saying it
5 is the same type of conduct, but it is all different. Yes,
6 but that's what RICO is. You have different instances of
7 crime, and the point that we are making is just that this is
8 not a situation where one type of crime overshadows another.
9 And on the point that some defendants seem to think that there
10 will be more evidence against one or the other, there's no
11 cases that say that. There's no cases that say just because
12 one defendant, there's more evidence against him, he should be
13 severed from the others.

14 And I think the reality is that's not going to be
15 the case, in any event. We'll have multiple witnesses who
16 speak to many of the different defendants, many different
17 schemes, there will be lots of overlap in the documents and in
18 the witness testimony.

19 So I think to just go back to Your Honor's question
20 about the consequence of how we've charged this, as I said,
21 the consequence is that we have a heavy burden. We have to
22 prove that relatedness and the threat of continuity into the
23 future. And that's something that is very real here. This is
24 why this case was charged in this way, because as one of
25 defense counsel said, this was a way of life. This was a

1 problem that was so pervasive that it was a pattern that was
2 across continents, across different soccer federations. It
3 requires a different type of charge than having one-off little
4 charges as to individual crimes. And that's why it is charged
5 that way.

6 THE COURT: Well, the other consequence, I assume,
7 is that I might be more restrictive when we get to the point
8 of analyzing what evidence you are going to put in about the
9 RICO conspiracy. That could be the other, quote-unquote,
10 consequence, as I have labeled it.

11 MS. MACE: Potentially. But, Your Honor, I think
12 the important thing at that time will be to apply Rule 403.
13 And so, here, I don't think any evidence will be of that sort
14 of heinous types that makes it so difficult for a jury to hear
15 as to one defendant and not think of as to another, if the
16 issue is cumulative, I think we will probably be --

17 THE COURT: Or irrelevant, rather. It doesn't
18 relate to these defendants. That's going be the argument you
19 are going to hear.

20 MS. MACE: Yes. And some defendants will argue that
21 it is irrelevant. And if we believe it is relevant because it
22 is necessary to prove a pattern, then we will lay out why that
23 is and how it ends up -- how it helps to demonstrate that
24 pattern. That's our burden of proof, to prove beyond a
25 reasonable doubt that it is one pattern. And so we will seek

1 to introduce that evidence. But we are not going to try to
2 introduce cumulative evidence, because that hurts us as well.
3 We don't want to have the important stuff buried by other
4 stuff that has nothing to do with the trial defendants. We're
5 only going to do that when we need to to prove that element
6 and burden that we have.

7 So I think that is the gist of our argument on
8 severance. I have just a few things to say on speedy trial
9 unless Your Honor has any questions.

10 THE COURT: No. Go right ahead.

11 MS. MACE: I think we'll rest on the law that we set
12 forth in our brief, but there's just a couple factual points
13 that I wanted to correct for the record, having listened to
14 Mr. Pappalardo on this.

15 One, Your Honor noted that Defendant Napout has
16 filed four motions, and Mr. Pappalardo pointed out that it was
17 on October 31 that he filed his motion for severance. I think
18 one -- it's a little point, but something that has some
19 significance is that a couple days later, on November 2, he
20 asked for a request for an extension to file his motions to
21 dismiss. So he got in his severance motion early, able to
22 make the rhetorical point, I would argue, that he has moved
23 for severance then. And the schedule set by the Court was
24 then adjourned two weeks so that he could file his motions to
25 dismiss. A small point, but just demonstrates that he wanted

1 to be able to file the motion to dismiss. We didn't oppose
2 the extension. We are all just participating in the same
3 schedule.

4 With regard to privilege, I would just note, I
5 disagree with a lot of what Mr. Pappalardo said about the
6 record, but it can speak for itself. I'll just note, though,
7 that this was not only an issue about the common interest
8 privilege, that going back to -- I have a letter from July of
9 2016, where defense counsel sends the government a list of
10 lawyers representing Mr. Napout, and several of the lawyers on
11 there never represented Mr. Napout. And it took us a long
12 time to unpack that and figure out what was going on, who
13 these lawyers were. Many of them -- one was the general
14 counsel for CONMEBOL. So it took the government some time to
15 figure out how to do the privilege review. And that
16 contributed to the delay.

17 THE COURT: One question I have. When were the
18 documents that were the subject of the discovery dispute
19 seized by the government? At the time of Mr. Napout's arrest,
20 or later?

21 MS. MACE: With regard to the privilege dispute, it
22 began, I guess, with the seizure from CONMEBOL, which was
23 early January, I believe, January 7.

24 THE COURT: Okay.

25 MS. PIÑERA-VAZQUEZ: 2016.

1 MS. MACE: Yes. 2016. And so promptly after that,
2 we began speaking with counsel for CONMEBOL, as well as
3 counsel for Napout, to try to figure out what lawyers
4 represented whom so that we could do this privilege review.
5 That process has taken a long time. There were several things
6 that were not accurately presented to us, and that's why we
7 had to ask Judge Levy to resolve the issue. And he found that
8 there was a difference in the representation of who
9 represented whom, that would have been told to the government
10 as well as the issue of the common interest privilege.

11 THE COURT: Right. As I guess as importantly, the
12 time that the government seized those CONMEBOL documents, the
13 defendant had already been charged and then was aware of the
14 seizure, hence prompting this procedure where he was allowed
15 to indicate who -- which lawyers may have represented him for
16 purposes of asserting a privilege as to some of these CONMEBOL
17 documents.

18 MS. MACE: Yes. And we reached out to him. We have
19 a long series of letters that are now all in the record from
20 the hearing before Judge Levy, where we asked everyone who
21 might have in interest, including the law firms, everyone, to
22 tell us who represented whom. We couldn't figure it out.
23 Because we had these conflicting documents from different
24 entities saying so-and-so represented this person, so-and-so
25 represented this person, and we just couldn't get to the

1 bottom of it. And that's -- we filed many letters, they are
2 on ECF, to the Court, asking for help. Because it just didn't
3 line up. It didn't match. And the concern, as we articulated
4 to Judge Levy, was that there was an effort on the part of an
5 alleged perpetrator to prevent a victim from sharing
6 information from the government. And that was sort of
7 underlying the issue with the CONMEBOL search.

8 The government through the government of Paraguay
9 did a search on CONMEBOL, but then, also, the entity CONMEBOL
10 was trying to cooperate with the government and wanted to give
11 us stuff and --

12 THE COURT: Mr. Napout --

13 MS. MACE: -- Defendant Napout was saying that the
14 victim could not give that stuff to the government.

15 THE COURT: Right. CONMEBOL, as victim, could not
16 give that information to the government.

17 MS. MACE: Correct.

18 THE COURT: Yes, I understand all that.

19 So, in essence, though, that process relating simply
20 to the CONMEBOL documents started in January 2016, and only
21 after a fair amount of briefing, discussions between the
22 parties, namely Napout's attorneys and the government, and a
23 hearing that Judge Levy thought was necessary to sort out the
24 claim of common interest privilege, that process basically
25 went from January 2016 to March of this year.

1 MS. MACE: That's right, Your Honor, and I guess --
2 on a happy note, I can tell you just an update on that, that
3 we hopefully have reached the end of that saga or near the
4 end. We have been speaking with counsel for Napout and
5 counsel for CONMEBOL, and come up with an agreed approach to
6 how to do that privilege review, and we have already begun
7 running the numbers to see what would be involved, how many
8 hits on lawyer's names and so forth. And it looks like it is
9 going to be a manageable size of documents. So --

10 THE COURT: Let me ask you a question, though. Had
11 Mr. Napout's attorneys not asserted some kind of privilege as
12 to the CONMEBOL documents, you would have disclosed them to
13 the parties back in January 2016 or thereabout?

14 MS. MACE: Shortly thereafter. There was a gap of
15 time between the actual seizure in Paraguay and when they
16 showed up on our doorstep. There was --

17 THE COURT: In transit.

18 MS. MACE: In transit. And that was not immediate.
19 I don't remember the date right now when we actually received
20 them, but it would have been early spring that we received
21 them. And then we could have processed those right away. As
22 I said, CONMEBOL was cooperative and willing to participate in
23 that privilege review immediately, so that we could get those
24 things out the door. And as I said, it looks like it is a
25 very small number of documents at issue that need to be

1 reviewed.

2 And so the rest, that 350,000 or so documents, most
3 of those we're preparing right now to send over to the
4 defense.

5 THE COURT: They haven't received them yet.

6 MS. MACE: They haven't received them because it is
7 just now that we got the ruling from Judge Levy, and that we
8 reached an agreement with defense counsel as to how to conduct
9 that privilege review.

10 THE COURT: Okay. Great. Anything else on speedy
11 trial?

12 MS. MACE: No, I don't think so, Your Honor.

13 THE COURT: All right.

14 MR. PAPPALARDO: Your Honor, may I?

15 THE COURT: Yes. I assumed you would.

16 MR. PAPPALARDO: Just one point, Your Honor.

17 It is one thing -- we oppose the scheduling order.
18 We objected to the scheduling order.

19 THE COURT: Let me back up. The reason I asked the
20 government those questions about the CONMEBOL documents is
21 that you cannot tell me that the time delay, if you will,
22 between January 2016 and March 10, 2017, at a minimum, was due
23 to the fact that you wanted to assert a privilege as to the
24 CONMEBOL documents. Now, you may take issue with how long
25 that process took, but my understanding from the government,

1 and I take the representation at face value, was that in the
2 beginning it was an iterative process between defense counsel
3 and the government, that the government claims that in some
4 way they were misinformed as to some of the attorneys who may
5 have represented Mr. Napout before, and that that had to be
6 sorted out as a rather complicated situation, factually as
7 well as legally, before Judge Levy or with Judge Levy's
8 intercession, and Judge Levy believed it required a hearing.
9 And based on what I have read of the decision and the hearing,
10 I agree that that was the sensible course, for your client, to
11 give him the fullest benefit of any argument you wanted to
12 make about a claim of suppression of these documents.

13 And so I just don't understand how you can argue
14 that that time shouldn't have stopped on that clock. Period.

15 MR. PAPPALARDO: I will let Ms. Piñera-Vazquez
16 address that because she was involved.

17 One thing I wish to point out for the record, Your
18 Honor, is that there was a moving target. There was an answer
19 to a question, which then the question changed.

20 Ms. Piñera-Vazquez sent a letter in. She was answering a
21 different question than the subsequent question that was
22 raised. There was some --

23 THE COURT: Misunderstanding.

24 MR. PAPPALARDO: -- confusion. We have no -- and
25 the other thing, Your Honor, that makes this kind of silly is

1 that the government has been in possession of probably, I
2 don't know this, but probably 95 percent of the materials that
3 they seized from CONMEBOL in a search on January 1. They were
4 already in possession of that information because they
5 received it from McDermott, who represented CONMEBOL in the
6 late fall of 2015.

7 But the whole point, Your Honor, we don't care about
8 those documents. The bottom line is this --

9 THE COURT: But you must have. You moved to prevent
10 the government from turning them over to everyone.

11 MR. PAPPALARDO: We simply pointed out that there
12 was -- we believe that there was a common interest privilege
13 with regard to commercial transactions. And then CONMEBOL
14 didn't waive commercial transactions. So that was the end of
15 the discussion as far as we were concerned.

16 THE COURT: I don't think that's accurate. I think
17 that there's an agreement that there is a common interest as
18 to commercial transactions, but that doesn't get to the
19 document or the issue here.

20 MR. PAPPALARDO: That was the only common interest
21 privilege that we asserted, Your Honor.

22 THE COURT: I don't think that's accurate.

23 MR. PAPPALARDO: It is, Your Honor. That's 100
24 percent accurate.

25 THE COURT: Well, maybe it's the scope, then, of how

1 you interpret commercial interest. Because what ended up
2 happening is we had a fierce battle with the government over
3 whether or not your client could tell CONMEBOL they couldn't
4 release certain documents that may relate to his possible
5 complicity in a scheme to -- a bribery scheme that hurt, so
6 goes the argument, CONMEBOL's interest. And that's where I
7 think the fight was. Maybe that's an interpretation --

8 MR. PAPPALARDO: No, Your Honor.

9 THE COURT: -- of what it means to have a common
10 interest over commercial transactions, but I believe it was
11 outside of that commercial transaction common interest that
12 the fight was. Am I misinterpreting that?

13 MR. PAPPALARDO: If I may, Your Honor, we don't --
14 our interests are not -- we don't -- we are not here to assert
15 CONMEBOL's interest. We didn't do that before. We only
16 raised the common interest privilege as it related to
17 commercial transactions, which we defined as interactions when
18 Napout was president of CONMEBOL to get contracts that were
19 already outstanding, paid, and things of that nature. Once
20 that was not subject to the waiver anymore, after the broad
21 waiver was carved out to exclude commercial transactions, that
22 ended it as far as my interests were concerned. The only --
23 the only problem that surfaced is that Mr. Burt was determined
24 to be representing CONMEBOL and Mr. Napout at the same time.
25 That's why we are not sorting out, you know, does the

1 privilege -- is this communication subject to a Napout
2 privilege or is it a CONMEBOL privilege. And that's what
3 we're sorting out now.

4 THE COURT: Okay.

5 MS. MACE: Your Honor, I don't think we need to
6 re-argue that whole issue. I do want to make one
7 clarification because this is significant, I think, in the
8 context of the speedy trial argument. As I said, as
9 Mr. Pappalardo just said, now that the government was a moving
10 target somehow. And what we did is we asked for a list of
11 defense counsel. And what we got back on July 7 is a letter
12 that said among others, Alfredo Montanaro represented
13 Mr. Napout.

14 There's no moving target here. It's not about what
15 you're searching or what the issue is. They said that the
16 general counsel of CONMEBOL represented Napout. And now, I
17 happen to know from the list of searches, that there are
18 several documents, hundreds of documents, that -- with
19 Mr. Alfredo Montanaro's name on it in the CONMEBOL documents,
20 and so when they say we could have turned them over before, we
21 couldn't do that proper privilege review without an accurate
22 list of who the lawyers were.

23 So we had to get to the bottom of it. We've done
24 that now, we are now moving quickly to be able to turn that
25 stuff over. But it is just not accurate to say that we could

1 have done it before when we didn't have accurate information.

2 MS. PIÑERA-VAZQUEZ: Your Honor, may I?

3 THE COURT: Yes. Speedy trial.

4 MS. PIÑERA-VAZQUEZ: Just as to speedy trial, to get
5 back on track, Your Honor. There's a couple of inaccuracies
6 that I would like to correct that Ms. Mace said before we
7 go --

8 THE COURT: Wait, wait. Slow.

9 MS. PIÑERA-VAZQUEZ: Silvia Piñera on behalf of Juan
10 Napout.

11 Your Honor, first of all, I would like to clarify
12 for the record, when Mr. Napout was arrested on December 3 in
13 Zurich, I was in Miami, and I immediately contacted Ms. Mace
14 and alerted her that the electronic devices that they seized
15 off my client potentially contained attorney-client privilege
16 information. So that was the first time that we communicated
17 that to the government.

18 A month later was the raid in CONMEBOL, where they
19 seized all these documents, January 1, 2016. By that time,
20 our client was already here in the United States, had asserted
21 his -- and requested a speedy trial, having waived extradition
22 from Switzerland. And, in fact, we even objected to the
23 complex designation, even though I understand the Court's
24 definition of the discovery and the indictment. And, in fact,
25 since that day, we have continually objected to any further

1 delay and requested a speedy trial.

2 Now, the government waited until July 26, seven
3 months later, to deal with this alleged privilege issue. In
4 other words, they didn't call me or call Mr. Pappalardo and
5 say, "Hey, we understand that there are these documents, let's
6 begin the process. Are we going to do a taint team, are we
7 going to do a Chinese wall with privilege?" You know, there's
8 20 million names for it now.

9 No. They waited seven months. They decided the
10 time frame, despite the fact that Mr. Napout had from
11 December 3 asserted an attorney-client privilege on all these
12 documents, which would extend to a certain extent to the
13 CONMEBOL documents. They decided.

14 Now, there's an allegation that Ms. Mace made that
15 there was some sort of -- the inference is that we -- we,
16 meaning Mr. Napout's lawyers, tried to sort of extend or
17 broaden the amount of lawyers that represented Mr. Napout to
18 trick the government. That's not the case, Your Honor. We
19 were asked a very broad question, and we responded, as we
20 should, as all the lawyers that we knew to have represented
21 Mr. Napout. That is now withered down, based on the narrowing
22 of the issues.

23 THE COURT: But let me ask you, though. I am not
24 assuming any kind of trickery involved, but the simple fact
25 that you named a number of lawyers, doesn't that support the

1 government's argument and address your own argument that it
2 took some time for the government to try to sort that out on
3 their own before coming to you in July of 2016 to figure this
4 out?

5 MS. PIÑERA-VAZQUEZ: Well, they waited seven months
6 to address an issue that we had been requesting for seven
7 months be addressed. We can't force them. We can't force
8 them, "You have to do this." I mean, we actually even met
9 with them at one point and said, "Can we go forward with
10 this?" We basically begged, "Let's get this over with. My
11 client wants a speedy trial. He wants to resolve this. He
12 wants to go back to Asunción and live his life." I mean, he's
13 been here for two years almost, Your Honor. And it dragged on
14 further. There's nothing else we could do. I mean, we did
15 the most we could to preserve our client's right to a speedy
16 trial.

17 Now, I agree with Ms. Mace, it's been sort of sorted
18 out, and we are proceeding now with a taint team. So I don't
19 want to deal with the privilege issue any more because I think
20 that's -- I just wanted to stress the point as far as speedy
21 trial is concerned.

22 The other factual disagreement I have with Ms. Mace
23 is that she made a statement where apparently -- or gave the
24 inference, and I think I heard it right, that somehow either
25 Mr. Napout or his attorneys tried to convince a witness to not

1 turn over certain documents. That is not true. I believe
2 that she mentioned Alfredo Montanaro.

3 THE COURT: Well, that's the argument. The argument
4 is you were saying that because of the common interest
5 privilege, this is the legal argument, Mr. Napout would have
6 say in whether or not the documents that CONMEBOL might have
7 wanted to turn over to the government could be turned over or
8 not. In other words, he could assert a common interest
9 privilege and say, no, those won't be turned over. That's
10 what you wanted, right?

11 MS. PIÑERA-VAZQUEZ: The problem is, that call was
12 never made. That influence was never exerted on any witness
13 by Mr. Napout or his lawyers.

14 THE COURT: So that's a legal argument you were
15 making. That was the whole point of the motion, right, is to
16 assert that common interest privilege so that Mr. Napout could
17 have a say about whether CONMEBOL documents were turned over
18 to the government.

19 MS. PIÑERA-VAZQUEZ: Well, two things. First of
20 all, it's CONMEBOL's privilege. But, more importantly, the
21 inference given was that Mr. Napout was trying to exert
22 illegal influence over a witness that had to turn over
23 documents that supposedly may harm him down the road, which
24 simply did not happen. I don't want that to be left on the
25 record because that could be the basis of what they will claim

1 down the road is either obstruction of justice or tampering
2 with witnesses. I want to be very clear, for the record, that
3 at no point has anybody tried to exert any witness at CONMEBOL
4 because that was a statement that was made.

5 THE COURT: Let me pause here for a moment. Whether
6 that comes in or not, I am not deciding that today. If the
7 government has evidence of some effort to obstruct justice,
8 you will both make your arguments about whether it is
9 legitimate evidence or not. But it doesn't affect the speedy
10 trial issue, one way or the other.

11 MS. PIÑERA-VAZQUEZ: So, basically, Your Honor, the
12 bottom line with the speedy trial is that our client has done
13 everything he can to exert that right. We had no control over
14 the government's schedule, and I understand the Court set the
15 schedule for the briefing. And we did object to the briefing.
16 That's why we filed our speedy trial motion on October --
17 early, before the Court required, and then they responded when
18 they had to. But there's nothing else that we could have done
19 to --

20 THE COURT: But what's the prejudice?

21 MS. PIÑERA-VAZQUEZ: Two years in the United States,
22 living under 24/7 security, not being able to work.
23 Your Honor, these are legitimate concerns. He's here alone in
24 this country. Yes, his family can come and go, but he has a
25 business that he's supposed to be running that he can't run.

1 He doesn't have unlimited resources like the government that
2 can spend four years investigating a case, two years waiting
3 for it to go to trial. I mean, when I was a prosecutor in the
4 Southern District of Florida, we were taught very clearly:
5 You do your investigation. The day you indict the case, you
6 get ready to try it within the speedy trial, and you turn over
7 all the discovery. And if you don't -- and it doesn't matter
8 how complex it was, you were ready to go to trial.

9 Certainly, that's not the case here, Your Honor.
10 What happened? I mean, it is two years down the road. The
11 prejudice -- he's sitting here, not being able to live his
12 life. And he's in custody. And he's -- there's no money. It
13 is running out.

14 And then the other thing, Judge, is discovery. I
15 mean, which is another issue, which I can talk about it now,
16 but when is it going to be cut off? I mean, motions are due
17 in a month. I just got a dump of discovery on Monday of
18 information that they had years ago. I mean, I don't
19 understand. Is there going to be a cutoff date? Are we going
20 to keep getting this rolling discovery or --

21 THE COURT: I think whatever evidence the government
22 has that might be introduced at trial, they should turn over
23 as soon as they get it. I don't think the complaint should be
24 that they are giving you too much information. If you get it
25 too late in relation to the trial, or in relation to being

1 able to make a motion to suppress or something else, that's a
2 legitimate argument. But then continuing to follow their
3 obligation to turn over discovery as they get it, I am not
4 going to fault them for that. Now --

5 MS. PIÑERA-VAZQUEZ: We want all the *Brady*. We want
6 all the *Brady*. For sure we want all the *Brady*. Yeah, we got
7 all the *Brady*, but we keep getting information that affects
8 the speedy trial. We can't effectively be prepared -- I mean,
9 the bottom line is, there has to be a cutoff date so we know
10 what we're able to investigate. We have to do our
11 investigation. We have actually affirmative defenses that we
12 are going to put on. So we have to do our investigation on
13 the discovery that they give us. How on earth can we do that
14 if the --

15 THE COURT: It's not going to affect speedy trial.
16 I mean, bear in mind, we have a trial date, which I thought
17 was the most curious part of your brief. You kept suggesting
18 that somehow there isn't going to be a trial on a date
19 certain. We have a date certain to start trial. That will
20 happen. The government has even acknowledged that if new
21 defendants come in between now and trial, it is likely that
22 they will have to be severed. I think we can all agree on
23 that.

24 In terms of evidence coming in, if you think there's
25 some unfairness brought by having received information late,

1 you should absolutely make that argument. But I am not moving
2 the trial date. We have a trial date. So to the extent that
3 you're arguing speedy trial, what you are talking about is the
4 time from now, and, quite frankly, when I resolve the motion
5 on the motion to dismiss -- I'm sorry, the motion for
6 severance, until we get to trial, your only argument, in my
7 opinion, is that you were somehow required to brief certain
8 issues at the same time as other defendants. There's just not
9 much percentage in that argument because we have a case that
10 involves multiple defendants. It would make no sense for me
11 to actually give everybody a separate deadline and require the
12 government to respond multiple times, especially when the
13 argument, as here, is really one sort of type of argument,
14 namely, prejudicial spillover, et cetera, et cetera.

15 But I hear what your argument is. I just have to
16 tell you, I don't accept it. And, also, I think there's so
17 many, as I mentioned before, different statutory ways in which
18 it was entirely proper to stop the running of the speedy trial
19 clock to exclude the time for some reasonable period to allow
20 other defendants to be brought in. Mr. Burga, I guess, would
21 be an example of someone who entered in at some point.

22 But, more importantly, to give your client ample
23 opportunity, which he has used quite readily to make all of
24 the arguments that you think are appropriate in his defense.
25 Everything from motions -- a motion to dismiss to the

1 discovery motion over the privilege, to the severance motion
2 and beyond. We have some more motions to get through before
3 we get to trial. And unless you want me to not allow you to
4 do that, there's really no argument to be made that this is
5 moving too slowly or in a way that prejudices your client in
6 some respect that the case law recognizes, as opposed to the
7 inconvenience it's brought on his life.

8 I am not minimizing that. I am sure it is quite
9 expensive for him to maintain a luxury apartment in Miami with
10 his whole family there.

11 MS. PIÑERA-VAZQUEZ: Actually, Judge, it is not
12 inconvenience. It is actually extremely prejudicial, and to
13 sort of make it seem as if he's living in a luxury apartment
14 with all his family and is not prejudicial is really wrong
15 because he is in custody. He in custody. He is living in a
16 foreign country. This is not his country. And he can't even
17 work in his business. So I think that it is prejudicial. I
18 mean, I don't think -- I wouldn't want to live in Paraguay for
19 two years away from my family, no matter whether I was living
20 in a presidential palace. I'd want to be at home with my
21 family going to my daughter's kindergarten graduation and my
22 son's first communion. I mean, it is prejudicial, Your Honor.
23 And I think the bottom line here is -- and I will sit down
24 because I think I have said too much.

25 There's a reason for speedy trial. There's no

1 question in this case the government was not ready to go to
2 trial when we asked for a speedy trial. They were not ready
3 to go to trial because we are still getting discovery today.
4 Two years later. If my client would have been granted what he
5 asked for, which was a speedy trial from the day he waived
6 extradition from Switzerland, he would be home today. He
7 would have been home several years ago.

8 This is not --

9 THE COURT: I cannot agree with anything you are
10 saying because of the process your client himself has availed
11 himself of. How much quicker could we have resolved four
12 different motions from your client alone? You would ask us to
13 fast track his entire trial ahead of everybody else, when you
14 have interceded with four different motions. I mean, if
15 anyone wants to complain, I imagine it might be the other
16 defendants who are stuck with your client who wants to file
17 every single motion.

18 And to the extent that there is late discovery, some
19 of it is these CONMEBOL documents that your client has been
20 fighting over letting the government produce or use.

21 So your argument, really, you are just the wrong
22 purveyor of that argument. If there's a speedy trial motion
23 to be made, I have to say, Mr. Napout is the last person for
24 whom I think it is valid, given how much process, rightfully,
25 as is his due right, has used, that has accounted for a huge

1 amount of the -- I am not even going to call it delay, but the
2 amount of time the case has consumed.

3 This is an enormous case that has a lot of
4 discovery, a lot of issues that have to be sorted out. We've
5 tried to move it along as expeditiously as possible, while
6 giving every defendant as much opportunity as they want to
7 make whatever motions they think are appropriate. But,
8 please.

9 MS. PIÑERA-VAZQUEZ: No, I think --

10 THE COURT: You can tell where I am coming from.

11 MS. PIÑERA-VAZQUEZ: We want our November 7 --

12 MR. PAPPALARDO: November 6.

13 MS. PIÑERA-VAZQUEZ: -- hopefully we'll go to trial
14 that day, November 6, and there'll be no --

15 THE COURT: Fear not. Subject to some, God forbid,
16 nuclear attack, we are going forward on November 7. So you
17 have your date certain for a trial. The question is, will be,
18 after I decide this motion, how many of the five defendants
19 will go to trial or at least will be slated to go to trial.

20 MR. STILLMAN: Your Honor, I have a less emotionally
21 charged comment. And that is, Ms. Mace refers to a 403
22 motion. Now, most of the time I have seen 403, it's during
23 trial, "Object, 403."

24 Now, do I understand the government's saying we are
25 going to tee up the 403 issue in advance of trial?

1 THE COURT: Yes.

2 MS. MACE: Yes, Your Honor. And, typically, we
3 style it as an other acts motion. Sometimes it's referred to
4 as a 404(b) motion. In a racketeering context it's not
5 typically 404(b) evidence because it is evidence of the
6 racketeering enterprise. And so it is typically our practice,
7 and we propose doing it in this case, to brief for the Court
8 what is outside of the conduct of the defendants who are going
9 to trial so that defense can object and say "We think that
10 should be excluded under 403" or any other basis.

11 THE COURT: I think that's a very prudent
12 alternative avenue we should pursue here because there will
13 be, to be sure, some argument, I imagine, about the other bad
14 acts, I will call it, evidence, even though technically it is
15 not.

16 MR. STILLMAN: Good to hear that, Your Honor. I
17 just wonder if I can -- I know judges don't like cross
18 questioning or talking.

19 THE COURT: Go ahead.

20 MR. STILLMAN: When?

21 THE COURT: Yes. So that's a subject of discussion.
22 I actually get to decide when, or at least I have some --

23 MS. MACE: Vision? So we will leave it to
24 Your Honor. I think a date that would make sense, sort of
25 looking to when the -- counting back from the trial date, we

1 thought that 90 days before trial, or August 7, would allow
2 time for briefing of that. If there are any defendants who
3 are no longer in the case, that will sort of help this shake
4 out as well, and that will allow time for resolution of that
5 in enough time for trial that everyone can prepare
6 appropriately.

7 THE COURT: Right.

8 What do you all think? 90 days?

9 MR. STILLMAN: In as much as I think -- we have a
10 May date for the motions we have to make. Why can't we put
11 all that together, and we will make our motions by May 8, and
12 let the government makes theirs, and get all these things teed
13 up, and get ourselves organized for a nice November 10 trial.

14 THE COURT: What's our May 8 deadline? Suppression,
15 or motions in limine, right?

16 MS. PIÑERA-VAZQUEZ: Any motions to the fact, to the
17 discovery.

18 THE COURT: Any motion to the discovery, or the
19 facts. Any factual --

20 MS. PIÑERA-VAZQUEZ: Motions to suppress, yeah.

21 THE COURT: I view these as different and, quite
22 frankly -- I don't know. I mean, I think the concern on the
23 government's part may be that it is a little early for you to
24 know exactly what you are going to put on for the other acts
25 evidence.

1 MS. MACE: Yes, Your Honor. And I think as trial
2 prep continues, one of the things that we do is we narrow that
3 evidence down to a smaller set of evidence, and, also, if
4 there are other resolutions, that can change the landscape
5 significantly. And so I found when we do it too far in
6 advance, then you end up doing it twice. And so that's part
7 of what motivates us, we want to leave enough time, and that's
8 why we're thinking August. I think a little bit before that
9 would be fine as well, but I think May is a little too early.

10 THE COURT: Well, I guess the question is, if we
11 want to combine the briefing, maybe what we might do is move
12 the suppressions motion until later, and still combine them
13 with the other acts, because I do think there's a certain
14 economy achieved by having one set of briefing.

15 So maybe we delay the motions to suppress by a month
16 and a half or so, and get us into July, and we have everything
17 done together in July. Does that sound workable?

18 MS. MACE: That would be fine with the government.

19 MR. STILLMAN: It's okay with us, yes.

20 THE COURT: Okay. They do have some crossover
21 potentially. But let's try that.

22 But then the government is going to have to produce
23 something in advance. Well, no, I guess you'll produce it at
24 that time, and then the other side will respond.

25 MS. MACE: See our motion. So I think it --

1 THE COURT: Sort of cross.

2 MS. MACE: -- perhaps it will work well, the
3 briefing schedule would be defense motions to suppress, on the
4 same day that we file our motion for --

5 THE COURT: Other acts.

6 MS. MACE: -- to admit other acts, and then we'll
7 have cross reply times, and we won't be each briefing them at
8 the same time.

9 THE COURT: Perfect.

10 MR. STILLMAN: And nobody likes the summer anyway.
11 (Laughter.)

12 THE COURT: Yes, Mr. Paulson?

13 MR. PAULSON: Judge, if I may --

14 MR. STILLMAN: Sorry. I also wanted to -- maybe
15 this is an appropriate time, Your Honor, to talk about the
16 *Jencks* and *Giglio* and things like that.

17 THE COURT: You mean in terms of when the government
18 will turn it over?

19 MR. STILLMAN: Yes, Your Honor.

20 THE COURT: Well, let's wait and see. One second.

21 Mr. Paulson, did you want to talk about this
22 briefing schedule we're proposing?

23 MR. PAULSON: Not the schedule so much, Your Honor,
24 but how the concept of the 403 motion and the other acts plays
25 into our severance argument.

1 THE COURT: Well, they will be separate. I am first
2 going to decide the severance issue. However, I cannot say
3 that the potential or the possibility of resolving some of
4 these claims of prejudice, by way of looking carefully at the
5 evidence that the government intends to produce on the RICO
6 conspiracy won't affect my decision.

7 Because, practically speaking, I am looking
8 forward -- ahead, rather, to what's the most efficient result.
9 And to the extent that we can address some of the prejudice
10 arguments that have been raised, there will be some
11 consideration of the possibility, but not necessarily the
12 resolution of those issues. So, in other words, you won't
13 know how those will resolve, but the fact that we have this
14 mechanism I think will play into my decision to some extent.

15 MR. PAULSON: My point, I guess, Your Honor, with
16 respect to Mr. Trujillo in particular, there may be other acts
17 that the government wants to introduce that are not part of
18 these five schemes that are relevant to these defendants, but
19 that might be relevant to the overall RICO conspiracy, to
20 which we would not have -- to which we would not have
21 objections insofar as they are introduced to prove the RICO
22 conspiracy with respect to Mr. Trujillo. However, most of our
23 prejudice arguments with respect to severance have nothing to
24 do with the other acts, they have to do with --

25 THE COURT: These defendants.

1 MR. PAULSON: -- the CONMEBOL, Copa do Brasil, Copa
2 Libertadores schemes, and how they relate to Mr. Trujillo.

3 THE COURT: I will specifically address your
4 client's arguments in that context. Because as I said, there
5 are sort of two aspects of the arguments that both sides --
6 that all defendants have made, the bigger RICO conspiracy
7 evidence argument, and then the more specific argument
8 vis-à-vis the other defendants who are going to trial. So I
9 will address that.

10 MR. PAULSON: Thank you.

11 THE COURT: The other thing I'll mention, although
12 I'm a little afraid to do this, is that it is possible that
13 when we get to this point of deciding what evidence might come
14 in or not come in, based on a 403 analysis, that it might
15 resuscitate an argument for severance, I can almost tell you
16 probably not as to the CONMEBOL defendants, but possibly as to
17 Mr. Takkas and Mr. Trujillo. Possibly. And so let's say you
18 survive this round. I will say that if at that time you think
19 it is worth reviving that argument, you can make your argument
20 at that time. In other words, if I say, yes, the government
21 gets to put in all of the evidence they want to establish
22 either RICO conspiracy or obviously the evidence relating to
23 the other defendants, I would permit you to try to re-argue
24 your severance if you wanted to at this point, at least with
25 respect to the two nonCONMEBOL defendants.

1 MR. PAULSON: Thank you, Your Honor.

2 THE COURT: So we'll see. I shouldn't actually
3 limit it to those two, but I won't necessarily reject it out
4 of hand. Because I realize that some part of the calculus may
5 have to do with how I make that determination about 403. This
6 is called a 403 analysis, okay, when we specifically find out
7 what the evidence is.

8 MS. MACE: Your Honor, just on that point, I think
9 there's -- I don't know if this is important to make now, but
10 on the 403 analysis, of course, it is defendant by defendant.

11 THE COURT: Yes.

12 MS. MACE: And so we will be arguing in our motion
13 what evidence can be admissible as to each defendant, and they
14 should be considered individually. And so if the Court were
15 to rule that the evidence is admissible and not unduly
16 prejudicial as to Defendant Trujillo, then I don't think that
17 would revive a motion for severance because that would be a
18 ruling that the evidence could come in even in a trial of just
19 Mr. Trujillo.

20 THE COURT: Right. You would say it would defeat
21 it, in effect.

22 MS. MACE: Yes. And if the Court were to find that
23 it is unduly prejudicial, there could be two results. I
24 suppose one would be that it would be excluded altogether, or
25 excluded as to one defendant with a limiting instruction. But

1 if the Court were to rule that it is admissible, I don't think
2 that that would then trigger a new severance motion.

3 THE COURT: It would be inconsistent. I understand
4 what you're saying. And I think that's a fair point. You
5 know, let's table that for now. Let's see what happens when
6 we get to the actual point of seeing this 403 evidence and how
7 that all shakes out.

8 Ms. Mace is probably right, that in order to make
9 the assessment that it is admissible, it probably subsumes the
10 argument that an individual defendant could be severed on that
11 basis. But I am just sort of thinking about -- thinking a
12 little bit how this is all going to work out.

13 So at this point I am not going to make a
14 determination either way. It is something for the defense,
15 obviously, to think about, not that I need to give you any
16 ideas. I am sure you would have thought of this on your own.
17 And the government would obviously respond that that would be
18 inappropriate, having made a finding that all of that
19 potential 403 evidence still comes in.

20 So let's -- the other question you asked,
21 Mr. Stillman, was about *Giglio* and *Jencks*, right? So we have
22 a trial date of November 7. I would think at least a month in
23 advance, four weeks in advance. This is a pretty -- this is
24 going to be a lot of evidence, right?

25 MS. MACE: There is. And I think, generally

1 speaking, that is appropriate. We would like to have an
2 opportunity to propose to the Court something a little bit
3 more detailed because there are some witnesses who are
4 particularly sensitive that will have to travel, and when they
5 are -- that we would not want to disclose certain things while
6 they are outside of the United States and so forth.

7 And so we would like to be specific with regard to
8 each witness. There are certain witnesses we can provide well
9 in advance, and others that we will want to do closer in time
10 to their testimony. So we would like to propose to the Court
11 something detailed --

12 THE COURT: That's fine. But in terms of the
13 information or witnesses as to whom there might not be any
14 special circumstances, how much time would you be willing to
15 turn that over or can you turn that over?

16 MS. MACE: I mean, certainly, a month before jury
17 selection, we can commit to now, and maybe even earlier for
18 some witnesses.

19 THE COURT: Right. I am wondering, six weeks for
20 the nonspecial stuff, and then we can discuss the schedule for
21 the other. Because --

22 MR. UDOLF: Judge, may I interrupt?

23 THE COURT: Yes.

24 MR. UDOLF: Is that as to *Giglio* and *Jencks*?

25 THE COURT: Yes. I believe so, right? Because the

1 concern, I think, is identifying who the person is. The
2 witnesses as to whom there's some sensitivity.

3 MR. UDOLF: Not the substance of what they say, just
4 the identity in general?

5 THE COURT: No, the substance of what they say, I
6 guess.

7 MS. MACE: Well, I mean, that's the issue, that
8 sometimes there is some very sensitive information that's
9 sensitive in and of itself and also some that makes it very
10 clear who the witness is or where they are and so forth.

11 And so we intend to get it to the defense in enough
12 time to prepare some of those sensitive witnesses. We will
13 have very small amounts of material that goes with them. But
14 as I said, we can propose something earlier to the Court
15 that's detailed, but we just don't want to commit now to early
16 disclosure of those sensitive witnesses.

17 THE COURT: What I propose is that for anything as
18 to which there's no special circumstance, if you could provide
19 that to the defense six weeks in advance, then certainly they
20 can spend a considerable amount of time digesting all the
21 nonspecial information, which will, to my mind, blunt an
22 argument that they don't have enough time to consider the much
23 smaller group of Jencks and *Giglio* relating to the more
24 sensitive witnesses. That would actually go a long way in
25 terms of my willingness to give you more time to -- more delay

1 in terms of turning it over for reasons that you will have to
2 provide justifying that.

3 So that's my proposal. So six weeks before the
4 trial date. Let me turn to my trusty deputy, who has to do
5 all these calculations.

6 And just so you know, we will recapitulate all these
7 deadlines in the docket order, in case you're not taking
8 copious notes.

9 THE COURTROOM DEPUTY: September 25.

10 THE COURT: September 25, for the government to turn
11 over *Jencks*, *Giglio*, relating to any witness as to whom they
12 are not making a special application. And I will urge the
13 government to turn over redacted copies of whatever you can,
14 even as to those witnesses you are concerned about, if you can
15 do so in a way that you think is consistent with whatever
16 security or other issues you have. Okay?

17 MS. MACE: Understood, Your Honor. Thank you.

18 THE COURT: Okay. And then you will at the same
19 time when you make that -- when you turn that over, submit
20 whatever application you want as to the other witnesses, but
21 do that ex parte, in camera, so that I can see those. And,
22 obviously, file notice that you're submitting it ex parte and
23 in camera so the defense knows that has happened. And I will
24 analyze those separately.

25 MS. MACE: Understood. Thank you.

1 THE COURT: All right. Does that satisfy your
2 question, Mr. Stillman?

3 MR. STILLMAN: It does, Your Honor. Thank you.

4 THE COURT: All right. Anything else from anyone
5 else about anything else?

6 MR. UDOLF: Judge, I have one issue. We have never
7 set a briefing schedule for Mr. Burga, and he just came into
8 court in December of this past year. And, you know, we were
9 not able to get in on the deadline for the motion to dismiss.
10 And then, unfortunately, I was taken sick and was out of
11 commission for two months. I have been in discussions with
12 counsel for the government, and they have no objection to
13 giving us three weeks, file anything that might be relevant to
14 a motion to dismiss, provided they have three weeks to
15 respond.

16 THE COURT: That's fine. Obviously, taking into
17 account what I have already written on the topic, based on the
18 motions filed by Mr. Marin and Mr. Napout, right?

19 MR. UDOLF: Right. To the extent it is duplicative,
20 we would incorporate their arguments.

21 THE COURT: Just to preserve it.

22 MR. UDOLF: Right. Just to preserve the issue. But
23 there are some issues that may be unique to Mr. Burga, so.

24 THE COURT: Right. I think you alluded to one.
25 That's fine.

1 Is the government in agreement, as Mr. Udolf says?

2 MS. MACE: Yes.

3 MR. NITZE: Yes.

4 THE COURT: Okay. So three weeks from now, which
5 is --

6 THE COURTROOM DEPUTY: April 27.

7 THE COURT: -- April 27, you will file something on
8 behalf of Mr. Burga.

9 And then three weeks after that --

10 THE COURTROOM DEPUTY: May 18.

11 THE COURT: -- the government will file its
12 response.

13 And then two weeks after that for reply.

14 THE COURTROOM DEPUTY: June 1.

15 THE COURT: All right.

16 MR. NITZE: Just on speedy trial, Your Honor. As
17 you noted, there are a number of bases on which the clock has
18 stopped, but we would ask that Your Honor continue the
19 designation of the case as complex, in our view, it is not a
20 close call, and exclude, in addition to the other bases, in
21 the interest of justice, on that ground.

22 THE COURT: Yes. I absolutely will.

23 I certainly have found more than once that this is a
24 complex case. And, certainly, that finding I think is
25 supported by the defendants' own submissions relating to the

1 scope of this case and the amount of evidence that has to be
2 digested and reviewed.

3 In addition, we still have pending motions.
4 Obviously, Mr. Burga has entered, and he's got a motion to
5 dismiss that will be pending, and then we will have more
6 motion practice relating to the 403. So for under a number of
7 reasons under 3161(h), I am going to toll the time until we
8 get to trial, because I know we will have motions all the way
9 up to trial.

10 All right. Obviously, you've preserved your speedy
11 trial motion.

12 MR. PAPPALARDO: Yes, Your Honor.

13 THE COURT: Thank you, everyone. Good seeing you
14 all again.

15 (WHEREUPON, at 12:25 p.m., the proceedings were
16 concluded.)

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18 * * * * *

19 **REPORTER'S CERTIFICATE**

20 I, ANNETTE M. MONTALVO, do hereby certify that the
21 above and foregoing constitutes a true and accurate transcript
22 of my stenographic notes and is a full, true and complete
transcript of the proceedings to the best of my ability.

23 Dated this 14th day of April, 2017.

24 /s/Annette M. Montalvo
25 Annette M. Montalvo, CSR, RDR, CRR
Official Court Reporter